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Judge Vail, July 26, 1984)

Secretary of Labor, MSHA v. Jim Walter Resources, Inc., Docket No. SE 84-23.  
Judge Merlin, July 30, 1984)

Secretary of Labor, MSHA v. Carbon County Coal Company, Docket No. WEST 82-106  
Judge Moore, Interlocutory Review of July 2, 1984 Order)

Secretary of Labor, MSHA v. Kennecott Minerals Company, Docket Nos.  
ST 82-155-M, WEST 83-60-M. (Judge Morris, August 21, 1984)

ry Goff v. Youghiogheny & Ohio Coal Company, Docket No. LAKE 84-86-D.  
Judge Melick, August 24, 1984)

view was denied in the following case during the month of September:

Secretary of Labor on behalf of John Cooley v. Ottawa Silica Company, Docket  
. LAKE 81-163-DM. (Judge Koutras, August 15, 1984)



## COMMISSION DECISIONS



A keystone of the Act is good faith compliance. In the case respondent did not demonstrate any statutory good faith because the violative conditions cited by Inspector Broome not abated until withdrawal orders were issued by MSHA Ins David Estrada on September 2, 1981 (Stipulation, paragraph

Considering the statutory criteria, and based on the record, I am unwilling to disturb the penalties proposed for these citations.

Based on the foregoing findings of fact and conclusions of law I enter the following:

ORDER

The following citations and the proposed penalties therefor are affirmed:

<u>Citation</u>	<u>Penalty</u>
588681	\$ 34
588682	72
588683	36
588715	195
588716	60
588717	60
588718	60
588719	44
588720	52

Respondent is ordered to pay to the Mine Safety and Health Administration the total sum of \$613 within 40 days of the date of this decision.

  
John J. Morris  
Administrative Law Judge



William A. VanWerven, President, Ferndale Ready Mix & Gravel,  
5271 Creighton Road, Ferndale, Washington 98248 (Certified

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, 10th FLOOR  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

SEP 2

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 84-142
Petitioner	:	A.C. No. 36-01965-03502
	:	
v.	:	Buck Run P045A Strip Min
	:	
READING ANTHRACITE COMPANY,	:	
Respondent	:	

## DECISION APPROVING SETTLEMENT

Before: Judge Koutras

### Statement of the Case

This proceeding concerns a civil penalty proposal filed by the petitioner against the respondent pursuant to section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking a civil penalty assessment in the amount of \$10,000, for a violation of mandatory safety standard 30 C.F.R. § 77.704-1(b). The section 104(a) citation no. 2100028, was issued by an MSHA inspector on September 22, 1983, during the course of an investigation of a fatal electrical accident in which a miner was electrocuted when he inadvertently came into contact with an energized component at the mine power substation. The victim was part of an electrical crew performing work at the substation at the time of the accident.

Respondent filed a timely answer contesting the citation and the case was scheduled for a hearing. However, the parties have filed a joint motion pursuant to Commission Rule 30, 29 C.F.R. § 2700.30, seeking my approval of a proposed settlement whereby the respondent agrees to pay a civil penalty in the amount of \$5,000, in settlement of the violation.

and full disclosure as to the facts and circumstances surrounding the accident, as well as a complete explanation and justification for the proposed reduction in the initial proposed civil penalty assessment. Included as part of the arguments in support of the motion, are copies of (1) MSHA's official accident report of investigation; (2) a report prepared by the Westinghouse Electric Corporation concerning certain testing conducted in an attempt to assist in determining the location of the electrical discharge involved in the accident; (3) a sketch of the substation prepared during the course of the investigation; (4) a transcript of interviews and statements made by two of the electrical crew members who were working at the substation at the time of the accident; and, (5) an accident report prepared by a State of Pennsylvania Mine Electrical Inspector.

Petitioner asserts that the electrical crew performing the work at the substation in question were part of a qualified crew consisting of a chief electrician, the accident victim, and two qualified electricians. The accident victim was a qualified electrician with six years experience in surface and underground electrical low, medium, and high voltage. The victim had suffered electrical burns to both his hands and in the center of his spine, but no one observed him contact live electrical parts, nor could anyone determine what electrical parts he had contacted. Although the spare electrical circuit at which the victim and another crew member performed their work was deenergized, the main power substation structure also supported incoming power lines of 66,000 volts and a stepped down power line of 4160 volts which remained energized while the pair worked on the substation roof. The power lines and components were located at heights of approximately 4 1/2 to 15 feet and 30 feet above the roof level. The components closest to where the victim and his fellow crew member were working carried 4160 volts and were located 4 1/2 feet above the substation roof.

Petitioner points out that immediately prior to starting the work, the victim and his fellow crew member discussed the presence of the hot lines and that the victim stated "as long as we are careful, we're all right . . . well, we're not going to get near that" (Transcript, 9/27/83, interview with crew member, p. 14). Petitioner concludes that it was the judgment of the experienced electrical crew (and of the victim in particular) that the job tasks they were performing

an experienced crew of electrical workers set up a job which involved their own personal safety, and that the evidence suggests that these qualified electricians considered themselves to be safe as long as they worked carefully.

The information provided by the petitioner reflects that the respondent is a medium sized operator producing 336,1 production tons of coal annually as of April 1984, and 31, 942 tons annually at its Buck Run P-45A strip mine at the same time.

During the two year period from 9/22/81 to 9/21/83, respondent received only one violation from MSHA, a § 104(a) citation citing 30 C.F.R. § 48.28(a) and a civil penalty in the sum of \$32.

The information provided by the petitioner also establishes that good faith was demonstrated promptly by the respondent holding a meeting with electricians at which time proper switching and grounding procedures in accordance with the regulations were established.

### Conclusion

After careful review and consideration of the pleadings, arguments, and submissions in support of the motion to approve the proposed settlement of this case, I conclude and find that it is reasonable and in the public interest. Accordingly, pursuant to 29 C.F.R. § 2700.30, the motion IS GRANTED, and the settlement IS APPROVED.

### ORDER

Respondent IS ORDERED to pay a civil penalty in the amount of \$5,000, in settlement of the citation in question, and payment is to be made to the petitioner within thirty (30) days of the date of this decision and order. Upon receipt of payment, this proceeding is dismissed.



George A. Koutras  
Administrative Law Judge

Distribution:

September 20, 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 84-31-M
Petitioner	:	A.C. No. 04-00196-05502
v.	:	
	:	Docket No. WEST 84-35-M
MONOLITH PORTLAND CEMENT CO.,	:	A.C. No. 04-00196-05504
Respondent	:	
	:	Docket No. WEST 84-56-M
	:	A.C. No. 04-00196-05505
	:	
	:	Monolith Cement Plant

### DECISION

Appearances: Herbert Jay Klein, Esq., Office of the Solicitor, U.S. Department of Labor, Los Angeles, California, for Petitioner; Jim Day, Safety and Training Supervisor, Monolith Portland Cement Company, Monolith, California, for Respondent.

Before: Judge Merlin

These cases are petitions for the assessment of civil penalties filed under section 110(a) of the Act by the Secretary of Labor against Monolith Portland Cement Company for alleged violations of the mandatory safety standards.

### Stipulations

At the hearing, the parties agreed to the following stipulations (Tr. 4):

1. The operator is the owner and operator of the subject mine.
2. The operator and the mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.
3. The administrative law judge has jurisdiction of these cases.

6. Imposition of any penalty will not directly affect the operator's ability to continue in business.
7. The alleged violations were abated in good faith.
8. The operator has a small history of prior violations.
9. The operator is moderately large in size.

WEST 84-31-M

Citation No. 2365907 sets forth the violative conditions or practices as follows:

The area where employees eat lunch was not kept clean and orderly in the Lab building. Several employees eating there were exposed to a fire hazard as well as a health hazard as the floor appeared unkempt.

30 C.F.R. § 56.20-3(a) provides as follows:

At all mining operations: (a) Workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly.

The parties stipulated to the facts set forth in citation (Tr. 6). An over-filled trash bin presented a definite fire hazard. However the Solicitor advised that it was now the Secretary's position that the operator was guilty of moderate negligence rather than recklessness (6-7). The operator agreed that the occurrence of a violation was reasonably likely because employees smoked in the area (Tr. 7). The violation was serious and the operator negligent. A penalty of \$150 is assessed.

WEST 84-35-M

Citation No. 2086560 provides as follows:

The passageway and working area of the 2 pier at the kiln had poor housekeeping and was not kept clean of tools and other materials. Employees assigned tasks in this area could trip, slip, or fall. These areas (piers) are travel

pe of accident which would occur would probably result in  
lost work day (Tr. 11). The violation was serious and the  
erator was negligent. A penalty of \$200 is assessed.

WEST 84-56-M

The Solicitor moved to vacate the one citation involved  
this matter (Tr. 14). The Solicitor adequately explained  
e basis for vacating this citation and as I have held  
eviously in other cases, vacation of a citation and  
thdrawal of penalty petition with respect to it is within  
e Solicitor's discretion.

ORDER

It is Ordered that the operator pay \$375 within 30 days  
the date of this decision.

A handwritten signature in black ink, appearing to read "Paul Merlin". The signature is fluid and cursive, with a large initial "P" and a long, sweeping underline.

Paul Merlin  
Chief Administrative Law Judge

**Distribution:**

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J. F. Day, Safety Director, Monolith Portland Cement  
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September 21, 1984

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 84-31-
Petitioner	:	A.C. No. 04-00196-0550
v.	:	
	:	
MONOLITH PORTLAND CEMENT CO.,	:	Docket No. WEST 84-35-
Respondent	:	A.C. No. 04-00196-0550
	:	
	:	Docket No. WEST 84-56-
	:	A.C. No. 04-00196-0550
	:	
	:	Monolith Cement Plant

AMENDED ORDER

The Order in the above-captioned case is amended to read "It is Ordered that the operator pay \$350 within 30 days of the date of this decision."



Paul Merlin  
Chief Administrative Law Judge

## Distribution:

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Mr. J. F. Day, Safety Director, Monolith Portland Cement  
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/gl



SEP 21 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 83-95-M
Petitioner	:	A.C. No. 21-00282-05508
v.	:	
	:	Minntac Mine
UNITED STATES STEEL	:	
CORPORATION,	:	Docket No. LAKE 83-100-M
Respondent	:	A.C. No. 21-00797-05501
	:	
	:	Minntac Warehouse
	:	
	:	Docket No. LAKE 84-5-M
	:	A.C. No. 21-00819-05502
	:	
	:	Docket No. LAKE 84-11-M
	:	A.C. No. 21-00819-05503
	:	
	:	Maintenance Department

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner; Louise Q. Symons, Esq., U.S. Steel Corporation, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Melick

These consolidated cases are before me upon the petitions for assessment of civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act", for violations of regulatory standards. The general issue before me is whether the United States Steel Corporation (U.S. Steel) has violated the regulations as alleged, and, if so, what is the appropriate penalty to be assessed in accordance with section 110(i) of the Act.

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erry F. Wisor, Esq.  
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U.S. Department of Labor  
15 Wilson Blvd.  
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Administrative Law Judge James A. Broderick  
Federal Mine Safety & Health Review Commission  
103 Leesburg Pike, 10th Floor  
Falls Church, Virginia 22041

ADMINISTRATIVE LAW JUDGE DECISIONS

SEP 4 1981

HARRISON WESTERN CORPORATION,	:	APPLICATION FOR REVIEW
Applicant	:	
	:	Docket No. CENT 81-249-
v.	:	Withdrawal Order No. 15
	:	Dated June 15, 1981
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Mt. Taylor Mine
ADMINISTRATION (MSHA),	:	
Respondent	:	

SUMMARY DECISION

Before: Judge Carlson

This case comes on for decision upon cross motions for summary decision filed by both parties under Commission Rule 2700.64. 1/ All facts are submitted by joint stipulation.

The case arose out of a withdrawal order issued by the Department of Labor's Mine Safety and Health Administration

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1/ 29 C.F.R. § 2700.64 states in part:

(a) Filing of motion for summary decision. At any time after commencement of a proceeding and before the scheduling hearing on the merits, a party to the proceeding may move the Judge to render summary decision disposing of all or part of the proceeding.

(b) Grounds. A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits show:  
(1) That there is no genuine issue as to any material fact;  
(2) that the moving party is entitled to summary decision as a matter of law.

support of their respective motions for summary decision.

I conclude that no material facts are in dispute and case is ripe for summary decision.

### ISSUE

The crucial issue to be decided is whether the issuance of the 107(a) withdrawal order challenged by Harrison Western is sustained in light of the prior issuance of 103(k) 4/ withdrawal order covering the same area of the mine.

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2/ A second order dated June 15, 1981 appears in the file. The reasons fully explained in the stipulation. The second order is a substitution for the first. For the purposes of this decision, the two are properly treated as one.

3/ As pertinent here, that section provides:

"Sec. 107(a) If, upon any inspection or investigation of any coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such mine until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

4/ Section 103(k) of the Act provides:

In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when presented with the issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when f

s decision. All exhibits mentioned in the stipulation are  
ed to this decision. The stipulation, omitting caption and  
ures, is as follows:

### . Statement of the Case

his proceeding was commenced by Harrison Western  
orporation ("Harrison"), pursuant to Section 107 of the  
ederal Mine Safety and Health Act of 1977 (the "Act"),  
or review of Section 107(a) Withdrawal Order No. 151337  
ated June 15, 1981 (Exhibit "A" attached hereto),  
ssued to it with regard to the Mt. Taylor Project  
"Project") by the Secretary's authorized representa-  
ive, Glenn C. Johnston. Harrison's Application for  
review was timely filed on or about July 15, 1981 and  
he Secretary's Answer was timely filed on or about July  
1, 1981.

ithdrawal Order No. 151337 replaced Section 107(a)  
ithdrawal Order No. 151295 (Exhibit "B") issued at 2:00  
.m. on October 3, 1979, also by Inspector Johnston.  
he original Order named "Gulf Mineral Resources  
Harrison Western, Inc.)" as operator and was sought to  
e enforced by the Secretary against Gulf Mineral  
esources Company ("Gulf") alone in Docket No. CENT  
0-309-M. While that case was pending, the Secretary  
evised his policy and regulations under the Act to  
rovide for issuance of citations and orders to  
roduction-operators and/or independent contractors. 30  
FR, Part 45; 45 F.R. 44494, July 1, 1980. As a result  
f this policy change and an agreement between the  
ecretary and Harrison, Withdrawal Order No. 151337 was  
ssued to Harrison on June 15, 1981, on the basis that  
arrison would have access to all applicable formal and  
nformal review procedures. Thereafter, motions to  
acate Withdrawal Order No. 151295 and to dismiss Docket  
o. CENT 80-309-M were granted by the Administrative Law  
udge assigned to that proceeding.

ince Order No. 151337 replaced Order No. 151295, they  
re virtually identical in all material respects, except  
nly that Harrison is named alone as the operator in  
rder No. 151337. The facts which underly and determine  
he validity of Order No. 151295 are likewise the facts  
hich underly and determine the validity of Order No.

the Project was a uranium mine in the construction. Gulf was the owner of the Project. Harrison was primary contractor for the shaft sinking portion construction. The Project was located approximately one mile north of San Mateo, Valencia County, New Mexico and was subject to the Act.

The shaft sinking operation consisted of excavating two parallel, vertical shafts, one twenty-four feet in diameter and the other fourteen feet in diameter. The two shafts were horizontally separated by a distance of about 400 feet and were connected by horizontal tunnels located at depths of approximately 700 feet, 1,600 feet, 2,600 feet, 3,100 feet and 3,200 feet. The planned total depth of both shafts was 3,300 feet. The principal elements of the shaft sinking operation included excavation, pouring a concrete liner around the circumference of each shaft, installation of air, water and power lines, installation of hoist and other transportation systems, and construction of operating stations in the horizontal connecting tunnels with the installation of associated equipment to be used in the mining process.

#### B. 24-Foot Shaft.

On October 3, 1979, the 24-foot shaft had been sunk to a depth of approximately 3,240 feet. A 220-foot headframe was located above the shaft on the surface. It contained the hoist equipment and control room. A main collar was installed at the surface which completely covered the shaft when its retractable, horizontal doors were shut. The doors were opened only to allow passage of men and materials by way of the hoisting mechanism. Two subcollars of a similar nature were located in the shaft a short distance below the main collar.

The lower deck of a three-deck Galloway was located at the 3,200-foot level near the bottom of the shaft on October 3, 1979. The Galloway was the working platform from which excavation, muck removal and concrete pouring was performed. It was suspended by four wire ropes from the hoisting mechanism located in the headframe on the surface.

headframe. Each was guided by a crosshead which travelled vertically along one pair of the wire ropes suspending the Galloway. In this manner, one bucket travelled along the east side of the shaft (No. 1) and the other travelled along the west side (No. 2). The wire rope suspending each bucket was attached to the bucket by a shackle assembly which was detachable.

A two-deck "chippy cage" travelled along wooden guides attached to the concrete perimeter liner on the north-west side of the shaft. This cage was similar to a small, rectangular elevator enclosed by a combination of welded steel plates and heavy wire mesh. It was suspended from the headframe on the surface by a 1-3/8 inch nonrotating wire rope, and was used for transporting men and performing repairs along the shaft perimeter.

A "basket" had been fabricated at the site for use in hoisting and lowering material and performing repair work in the shaft. It was made of 1/2-inch steel plate and was 4-feet square with sides 42 inches high. At the surface, it could be attached to the shackle assembly of the other bucket hoisting cable by four 1-inch wire ropes, each 10 feet long. The other end of these four ropes would be attached to the top corners of the basket by shackles. When the basket was attached in this manner and placed in place of one of the buckets, and with the crosshead fixed in the headframe, the basket could be swung the required horizontal distance to the perimeter of the shaft for repair work. When the basket was attached in this manner and suspended freely without being swung to the perimeter, the horizontal distance between it and the "chippy cage" was 17 feet.

A 28-inch diameter "slickline" pipe was installed vertically in the shaft at the perimeter adjacent to the "chippy cage." Directly opposite from the "slickline," a 2-inch compressed air line was installed vertically along the perimeter of the shaft. Both of these lines extended from the surface to virtually the bottom of the shaft.



### III. Events of October 3, 1979, Up To and Including the Accident

The crew assigned to work in the 24-foot shaft on October 3, 1979 was under the general supervision of Wayne Thomas, whose title was "walker." This position was equivalent to that of general foreman for the ground shaft sinking operation. Stanley Henry was "shaft leader" of the crew, which is a position equivalent to foreman. The crew working at Henry's direction in the shaft on that day consisted of Bob Hales, Castillo, Jack Mathieu, David Stovall and Michael. These five men held the designation of either shift miner or operator, which were roughly equivalent positions with small wage differentials. All were Harrison employees.

This group met in the construction trailer on the surface to receive directions for the day's work at the start of the shift (approximately 7:30 a.m.) on October 3, 1979. Thomas directed Henry to have four men aligning the "slickline" starting at about the 2600 level of the shaft, using the "chippy cage" as a platform. Henry directed Castillo, Mathieu, Stovall and Borody to perform this work in pairs. Because of the strenuous nature of the work and the limited area of the "chippy cage" platform, each pair was to work in alternating two-hour shifts, with the off pair resting at the 2600-level station. Thomas' initial assignment for Henry and Hales was to remove muck from the bottom of the shaft.

Henry and his shaft crew commenced the work as assigned shortly after 8:00 a.m. Later that morning, Thomas went to the bottom of the shaft where Henry and Hales were working to change their assignment. He directed them to install several valves at various points along the length of the 12-inch air line. After shutting off the air supply to the line and opening a valve to build up pressure from it, Thomas, Henry and Hales came to the surface in the No. 2 bucket. While Thomas attended to other matters, Henry and Hales gathered together the tools and materials needed to install the valves with the assistance of the toplanders (Harrison employees).

groups walked [sic] their lights and shouted to each other.

Henry and Hales had their backs to each other as the basket descended through about the 2900-foot level at approximately 11:25 a.m. At that point, Hales heard a dull thump and turned to see Henry falling into the corner of the basket. Hales signalled to the hoistman on the surface to stop their descent. He then checked Henry for life signs and found none. He then signalled to the hoistman to bring them to the surface. When they reached the surface, Henry was examined by one of the toplanders who was a paramedic. No vital signs were detected. Henry was taken by ambulance to a nearby hospital in Grants, New Mexico, and pronounced dead on arrival at 12:04 p.m.

#### IV. Accident Investigation and Order at Issue in this Proceeding

The federal and state mine safety agencies were notified of the accident immediately after the basket reached the surface and Hales was able to inform surface personnel of what had happened. Notification to MSHA was received by the Albuquerque field office at 11:40 a.m. At 11:45 a.m., Inspector Johnston issued Withdrawal Order No. 151293 under Section 103(k) of the Act (Exhibit "C") "to prevent the destruction of any evidence that may be of assistance in investigating the accident and to assure safety of all persons in or near the accident area until the investigation is complete, ...." The area to which that Order applied was described as:

24 ft. diam. shaft, approximately on 2950 foot level in #2 bucket position ...

This Order was not modified in any manner until 8:35 p.m. that evening.

Upon learning of the accident and the Section 103(k) Order, Harrison's safety engineer, David Wolfe, directed all concerned not to disturb any evidence related to the accident and to remove the remaining men from the 24-foot shaft. Accordingly, Castillo, Mathieu, Stovall and Borody, came to the surface by means of the "chippy cage."

examining the solid, basket and chippy cage surface, they descended into the 24-foot shaft by of the "chippy cage." They found a 4 1/2-pound wedge on the top deck of the Galloway, which was 36 feet above the bottom deck. They also found a hard hat with a hole in it at the bottom of the shaft below the Galloway. It was determined that Cast Mathieu had been using the wedge at the 2400-foot level to hold the "slickline" away from the concrete lining of the shaft. The safety rope which was tied by a knot through a 3/4-inch nut welded to the wedge was broken. Castillo and Mathieu had discovered the missing at about the time of the accident when they pulled on the safety rope and found only the frayed ends.

It was, therefore, concluded from the investigation that Henry had been struck by the wedge at approximately 2950-foot level when it became detached in an unusual manner and fell from the 2400-foot level. It was further determined that neither the "chippy cage" nor the basket was provided with a bonnet or other overhead protection at the time of the accident.

In the early stages of the on-site accident investigation, Inspector Johnston issued Section 107(a) of the Mineral Extraction Act, Order No. 151295 at 2:00 p.m. on October 10, 1979 (Exhibit "B") on the basis of his determination that imminent danger under the Act existed. Inspector Johnston described the area to which the Order was applicable as "24 ft. shaft, #2 bucket position 2950 feet below collar of shaft." The "conditions of practice" recited in the Order was as follows:

At approximately 1125 hours on 10-3-79, a fatal accident occurred in the 24-foot diameter shaft. The victim and his partner were being lowered in a conveyance that did not have a protective bonnet installed. An object from above struck the victim on the head at a point 2950 ft. (approx.) below the collar of shaft. A two-man crew was working approximately 500 ft. (about the 2400-foot level) above the unprotected conveyance of the victim and his partner, mentioned above.

withdrawal order is invalid because the essential element of an imminent danger" was absent at the time the order was issued. It was so, according to the applicant, because all miners who possibly would have been harmed had already been removed from the hazardous area. Also, the basket and the "chippy cage," which were inherent parts of the hazard, had been moved to the surface. Consequently, the argument proceeds, no imminent danger "existed" in the meaning of section 107(a). Moreover, the miners were already afforded protection by virtue of a previously issued (k) order.

Before going further we must examine the concept of an imminent danger." Section 3(j) of the Act defines the term as

... the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.

dealing directly with the notion of "imminence" are in the regulatory agreement that the danger must be one which can cause serious physical harm at any time, but not necessarily immediately.<sup>5/</sup>

In its opening brief Harrison Western urges that since its the basket and the cage were all on the surface when the inspector arrived, we are presented with "... a typical case in which the inspector issued a withdrawal order based on prior circumstances which he claimed had constituted an imminent danger, but which no longer existed." <sup>6/</sup> It is true that imminent danger withdrawals may not be issued for past dangers. Neither the Commission nor its predecessor, the Interior Board of Mine Operations Appeals, however, has ever suggested that an imminent danger vanishes simply because miners are moved elsewhere or mobile equipment is moved. The danger remains a continuing subject of an order until the underlying condition giving rise to the danger is corrected. In Eastern Associated Coal Corp. v. Interior Board of Mine Operations Appeals, 491 F. 2d 277 (9th Cir. 1974), where miners were voluntarily withdrawn from a hazardous area before a withdrawal order was issued under section

---

See, e.g. Old Ben Coal Corporation v. Interior Board of Mine Operations Appeals, 491 F. 2d 277 (9th Cir. 1974).

before the dangerous condition is eliminated. The re-  
behind such a principle is clear. Where miners are vol-  
withdrawn by an operator they may just as easily be ord-  
before abatement is complete. An order by an authorize  
sentative of the Secretary of Labor, on the other hand  
legal force which forbids return of a workforce before  
underlying hazard is eliminated.

Harrison Western, in its excellent briefs, speaks  
to the fact that the fatality in the present case took  
about 11:25 a.m. but the inspector did not issue his im-  
danger withdrawal order until 2:00 p.m., a time after  
were out of the shaft and the cage and basket were at  
To the extent that applicant thus appears to suggest t-  
alone vitiated the 107(a) order because the imminent d-  
longer "existed," the suggestion is wholly without mer-  
"normal mining" (in this case shaft construction) were  
it must be inferred that miners would continue to work  
hoist conveyances which were not equipped with protect-  
overhead. 8/

In sum, Harrison Western has simply taken too par-  
view of the concept of a hazard or "danger" as embodie-  
The applicant stresses the inspector's highly literal o-  
of the circumstances leading to the accident and then  
that since none of those circumstances existed at 2:00  
hazard had been "eliminated." On the contrary, the da-  
the very nature of the work to be done and the fact th-  
were doing that work without protection from falling o-  
Such a danger does not cease within the contemplation o-  
107(a) merely because miners come to the surface or go  
the night.

---

7/ Section 104(a) of the 1969 Act is in all significant  
identical to section 107(a) of the 1977 Act.

8/ The record shows that a protective bonnet was inst-  
on the day following the accident. (See stipulated exh-

under 103(k), may he legitimately superimpose a 107(a) imminent danger withdrawal order? Put another way, can there be an "imminent danger" where miners already have been ordered out, voluntarily by a mine operator, but by a representative of the Secretary of Labor acting under the authority of the Act?

In such a case it cannot be said, as with a wholly voluntary withdrawal, that exposure of the miners could reoccur at the behest of the employing operator or contractor. Thus, one can construct an argument that a subsequent 107(a) order issued while a 103(k) order remains in effect is invalid because the prior 103(k) order nullifies any realistic possibility of injury to miners and thus any "imminent danger."

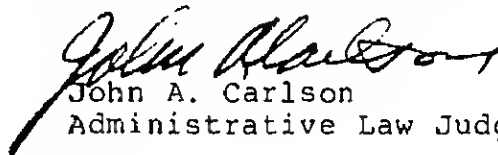
This argument, too, must be rejected. To understand why one merely need look to how 103(k) and 107(a) fit into the statutory enforcement scheme. Their purposes differ. Section 103(k) confers broad emergency powers upon the Secretary to take charge of an accident scene and, in the words of the statute, "... issue such orders as he deems appropriate to insure the safety of any person ...." See Roscoe Page v. Valley Camp Coal Co., 6 IBMA L (1976).

A 107(a) order, on the other hand, is more limited and more closely focused. It may issue only upon a specific determination of an "imminent danger" and, once issued, remains in effect to protect miners until the conditions constituting the danger are corrected. When a 103(k) order is issued the cause of the accident is often unknown until the Secretary's investigation discovers it. Moreover, investigation may not disclose an imminent danger at every accident scene. It is wholly proper, however, for inspectors to proceed to issue a 107(a) order when an imminently dangerous condition is found, even though a 103(k) order may already be in effect. Itmann Coal Company, 1 FMSHR 1573 (1979). This is so, if for no other reason, because the accident investigation may be completed and all rescue and other accident exigencies dealt with long before the conditions constituting an imminent danger are corrected. In that event a 103(k) order would likely be ripe for termination while a 107(a) order should remain effective to accomplish its narrower and more specific aims. Thus, once the Secretary properly determines

existence of an imminent danger. The issuance of the 107 withdrawal order was therefore proper. Consequently, the respondent Secretary's motion for summary decision will be granted, and Harrison Western's motion for the same relief be denied.

ORDER

In accordance with the foregoing, the applicant's motion for summary decision is DENIED, respondent's motion for summary decision is GRANTED and the withdrawal order issued by the respondent under section 107(a) of the Act is ORDERED AFFIRMED.

  
John A. Carlson  
Administrative Law Judge

Distribution:

Eloise V. Vellucci, Esq., Office of the Solicitor, U.S.  
Department of Labor, 555 Griffin Square, Suite 501, Dallas,  
Texas 75202 (Certified Mail)

Richard L. Fanyo, Esq., Welborn, Dufford & Brown, 1700 Broadway,  
Denver, Colorado 80290-1199 (Certified Mail)

/blc

REVERSE) ☒ (SEE REVERSE)  
VES TO Guy Mills  
OPERATOR Harrison Western Corpor  
MINE ID 29-01375-I35 (CONTRACT  
E OF ACTION 1102-  
VIOLATION OF SECTION \_\_\_\_\_ OF THE ACT  
T AND SECTION 57-119  
OF TITLE 30 CODE OF FEDERAL REGULATIONS.  
E OF INSPECTION 030 ☒ SIGNIFICANT AND SUBSTANTIAL (SEE REVERSE)

ADDITION OR PRACTICE On Oct 3 1999 at 11:00 hours it was observed that at approx  
11:00 hours a fatal accident occurred in the 24 foot diameter shaft.  
The victim and his partner were being lowered in a conveyance that did not have a pro  
tective net installed. An object from above struck the victim on the head at  
approx 10 feet (approx) below the collar of the shaft. A two-man crew was working  
approximately 100 feet (about the 100 foot level), above the unprotected survivor  
in the shaft. #2 bucket position approx 1750 feet below collar  
shaft.

INITIAL ACTION ☐ NOTICE ☐ CITATION ☐ ORDER ☒ NO. \_\_\_\_\_ DATED 10/7/99 MO 10 DA 7  
TERMINATION DUE DATE 10/7/99 MO 10 DA 7 YR 99 TIME 12:00 (24 HR CLOCK) SIGNATURE [Signature]  
CONDITION TO TERMINATE Condition no longer exists. Order No. 151295 was terminated 10-19-  
11 hours. Cannot install Work practices published and implemented.  
E 06/15/81 MO 06 DA 15 YR 81 TIME 0800 (24 HR CLOCK) SIGNATURE [Signature] AR 11 ☒ SEE SUB  
ACTION

UNITED STATES DEPARTMENT OF LABOR  
SAFETY AND HEALTH ADMINISTRATION  
FORM 7000-3a (3-78)  
SUBSEQUENT ACTION ☒ CONTINUATION ☐ CITATION ☒ ORDER DATE 06/15/81 MO 06 DA 15 YR 81 TIME 0800 (24 HR CLOCK)  
VES TO Guy Mills  
OPERATOR Harrison Western Corpor  
MINE ID 29-01375-I35 (CONTRACT

NOTIFICATION FOR ACTION CHECKED BELOW  
The victim and his partner mentioned above.  
work  
Safe shaft practices should be implemented, published to employees  
and followed.

EXTENDED TO DATE 10/7/99 MO 10 DA 7 YR 99 TIME 12:00 (24 HR CLOCK) ☐ VACATED DATE 10/7/99 MO 10 DA 7 YR 99 TIME 12:00 (24 HR CLOCK)  
TERMINATED ☐ MODIFIED ☐ SEE SUBSEQUENT ACTION SHEET  
E OF INSPECTION 030 SIGNATURE [Signature]



DATE MO / DA / YR TIME (24 HR CLOCK) SIGNATURE AR ☐ SEE S ACTION

TO Dave Wolfe OPERATOR Gulf Mineral Resources (Harrison)  
Mount Taylor Project MINE I.D. 27-01375 (24 HR CLOCK)  
ACTION FOR ACTION CHECKED BELOW Two-man crew was working  
approximately 500 ft (about the 200 foot level) above  
an unprotected canveyard at the victim's address  
mentioned above.

Safe shaft work practices shall be im-  
plemented, published to employees, and followed

TERMINATED TO DATE MO / DA / YR TIME 124 HR CLOCK ☐ VACATED DATE MO / DA / YR TIME 124 HR CLOCK  
TERMINATED ☐ MODIFIED ☒ SEE SUBSEQUENT ACTION SHEET  
TYPE OF INSPECTION 430 SIGNATURE Blaine Johnston

UNITED STATES DEPARTMENT OF LABOR  
SAFETY AND HEALTH ADMINISTRATION  
OSHA 7000-34 (3-70)

NO 151295 DATED 10/03/79  
MO DA YR  
SEQUENTIAL ☐ CONTINUATION ☒ CITATION ☐ ORDER DATE 10/29/79 TIME 1531  
MO DA YR (24 HR CLOCK)

TO Dave Wolfe OPERATOR Gulf Mineral Resources (Harrison)  
Mount Taylor Project MINE I.D. 27-01375 (24 HR CLOCK)  
ACTION FOR ACTION CHECKED BELOW A PROTECTIVE BARRIER WAS INSTALLED  
THE BARRIER ON 10-4-79 AT 1230 HRS. SAFE  
WORK PRACTICES WERE PUBLISHED AND IMPLEMENTED TO  
EMPLOYEES.

TERMINATED TO DATE MO / DA / YR TIME 124 HR CLOCK ☐ VACATED DATE MO / DA / YR TIME 124 HR CLOCK  
TERMINATED ☐ MODIFIED ☐ SEE SUBSEQUENT ACTION SHEET

SUBSEQUENT  
ACTION

☐

CONTINUATION

☐

CITATION

☒

DROER

DATE

MO

DA

YR

TIME

(24 HR CLOCK)

ED TO

Dave Wolfe

OPERATOR

Gulf Mineral Resources Corporation West

Mount Taylor Project

MINE I.D.

29-01375-

(CON)

IFICATION FOR ACTION CHECKED BELOW

The Termination to the above numbered order is hereby modified  
to show an X in the Order box and not the Citation Box

EXTENDED TO: DATE

MO

DA

YR

TIME

(24 HR CLOCK)

☐

VACATED

DATE

MO

DA

YR

TIME

(24 HR)

TERMINATED

☒

MODIFIED

☐

SEE SUBSEQUENT ACTION SHEET

TYPE OF INSPECTION

030

SIGNATURE

Julian Kammaly

SUBSEQUENT  
ACTION

☐

CONTINUATION

☐

CITATION

☒

ORDER

DATE

MO

DA

YR

TIME

(24 HR CLOCK)

ED TO

Dave Wolfe

OPERATOR

Gulf Mineral Resources Corporation West

Mount Taylor Project

MINE I.D.

29-01375-

(CONTR)

IFICATION FOR ACTION CHECKED BELOW

This is to modify the modification  
the Abatement of Order #151295 (modification was  
made 11-02-79 @ 1234 hrs).

1. The modification was to modify the abatement of the order  
not the order.

2. To mark the order box instead of citation box  
as a permanent and to change type of inspection from  
fatal because the abatement was made on a regular  
inspection

EXTENDED TO: DATE

MO

DA

YR

TIME

(24 HR CLOCK)

☐

VACATED

DATE

MO

DA

YR

TIME

(24 HR)

TERMINATED

☒

MODIFIED

☐

SEE SUBSEQUENT ACTION SHEET

OTO GUY MILLS  
Mount Taylor Project

MINE I.D. 29-01375-J35 (COR)

IFICATION FOR ACTION CHECKED BELOW

This is to change the name of the operator to Harrison Western Corporation and to add the Contractor number (J35)

EXTENDED TO: DATE MO / DA / YR TIME 24 (24 HR CLOCK)

TERMINATED ☒ MODIFIED

TYPE OF INSPECTION 030

☐ VACATED

DATE MO / DA / YR TIME 24 (24 HR CLOCK)

☐ SEE SUBSEQUENT ACTION SHEET

SIGNATURE

Glenn C. Johnston

ED STATES DEPARTMENT OF LABOR  
SAFETY AND HEALTH ADMINISTRATION  
A FORM 7000-2a (3-78)

SUBSEQUENT ACTION

☐ CONTINUATION

☐ CITATION

☒ ORDER

DATE 06/15/81

TIME 0800 (24 HR CLOCK)

IVED TO Guy Mills  
E MT Taylor Mine

OPERATOR Harrison-Western Corp

MINE I.D. 29-01375-J35

IFICATION FOR ACTION CHECKED BELOW

Order No. 151295, issued to Gulf Mineral Resources on October 3, 1979, is vacated and replaced by order No. 151 issued to Harrison-Western Corporation, I.D. No. 29-01375-

EXTENDED TO: DATE MO / DA / YR TIME 24 (24 HR CLOCK)

TERMINATED ☐ MODIFIED

TYPE OF INSPECTION 030

☒ VACATED

DATE 06/15/81

☐ SEE SUBSEQUENT ACTION SHEET

SIGNATURE

Glenn C. Johnston

CONDITION OR PRACTICE OF APPROXIMATELY 475 FEET ON 10/13/79 AT 2:31  
 OCCURRED IN THE 24 FOOT SHAFT. THIS ORDER IS ISSUED TO PREVENT  
 STRUCTURE OF ANY EVIDENCE THAT MAY BE OF ASSISTANCE IN INVESTIGATING  
 THE ACCIDENT AND TO ASSURE SAFETY OF ALL PERSONS IN THE  
 ACCIDENT AREA UNTIL THE INVESTIGATION IS COMPLETE.  
 CAUSE OCCURS OF THE ACCIDENT HAVE BEEN DETERMINED.

AREA OR EQUIPMENT 24 FT DIAM SHAFT, APPROXIMATELY ON 2950 FEET  
 IN A BUCKET POSITION VICTIM WAS 2 HARRISON WESTERN EMPLOYEE

INITIAL ACTION ☐ NOTICE ☐ CITATION ☐ ORDER NO. 151293-1 DATED 10/13/79 MO / DA / YR

TERMINATION DUE DATE MO 1 / DA 1 / YR TIME 121 HR CLOCK SIGNATURE Glenn Johnston

ACTION TO TERMINATE

DATE MO 1 / DA 1 / YR TIME 124 HR CLOCK SIGNATURE Glenn Johnston

SEE SUBSEQUENT ACTION

UNITED STATES DEPARTMENT OF LABOR  
 SAFETY AND HEALTH ADMINISTRATION  
 FORM 7000-3a (3 78)

SUBSEQUENT ACTION ☐ CONTINUATION ☐ CITATION ☒ ORDER DATE 10/13/79 MO / DA / YR TIME 203 (24 HR CLOCK)

ED TO THE MANZANARES OPERATOR SELF-MINERAL RESOURCES  
MARK DYER PROJECT MINE I.D. 29-01375

IFICATION FOR ACTION CHECKED BELOW THIS MODIFIES ORDER # 151293 &  
CAUTION: THE CHIPPY CRANE AND HOIST SHALL NOT BE USED  
EXCEPT IN A SAFETY EMERGENCY. THE GALLERY MAY BE RAISED  
FEET, BUT NOT USED OR WORKED ON. THE DOUBLE DRUM  
BUCKLES MAY BE USED TO RISE & LOWER MEN AND TO  
MAKE REPAIRS ON 16, 26 AND 31 SHIFT STATIONS. NO  
WORK SHALL BE DONE WITHIN THE 24 FOOT SHAFT ON PIPE # 11  
OR SLICK LINE. MEN MAY BE HOISTED FROM THE  
PATTERN

EXTENDED TO: DATE MO 1 / DA 1 / YR TIME 124 HR CLOCK ☐ VACATED DATE MO 1 / DA 1 / YR TIME 124 HR

TERMINATED ☒ MODIFIED ☐ SEE SUBSEQUENT ACTION SHEET

TYPE OF INSPECTION OSC SIGNATURE Glenn Johnston

EXHIBIT "C"

SUBSEQUENT ACTION ☐ CONTINUATION ☐ CITATION ☒ ORDER DATE 10/14/79 TIME 144  
(24 HR CLOCK)  
MO DA YR  
TO Dave Wolfe OPERATOR Gulf Mineral Resources (Harrison)  
Mount Taylor Project MINE I.D. 29-01375 (CO)  
REASON FOR ACTION CHECKED BELOW This is to modify order #151293  
the first modification of order #151293, as follows:  
issued to Dave Wolfe

Operator Gulf Mineral Resources (Harrison Western)  
This also modifies order #151293 as follows: The chippy  
and hoist may be used for air transportation and  
materials. But no maintenance or repair may be done offit  
TENTED TO DATE MO/DA/YR TIME (24 HR CLOCK) ☐ VACATED DATE MO/DA/YR TIME (24 HR CLOCK)  
TERMINATED ☒ MODIFIED ☐ SEE SUBSEQUENT ACTION SHEET  
TYPE OF INSPECTION Q30 SIGNATURE Henry Hunter

SUBSEQUENT ACTION ☐ CONTINUATION ☐ CITATION ☒ ORDER DATE 10/10/79 TIME 103  
(24 HR CLOCK)  
MO DA YR  
TO Dave Wolfe OPERATOR Gulf Mineral Resources (Harrison)  
Mount Taylor Project MINE I.D. 29-01375 (CO)  
REASON FOR ACTION CHECKED BELOW THE INVESTIGATION OF THE FATAL ACCIDENT  
COMPLETE.

TENTED TO DATE MO/DA/YR TIME (24 HR CLOCK) ☐ VACATED DATE MO/DA/YR TIME (24 HR CLOCK)  
TERMINATED ☐ MODIFIED ☐ SEE SUBSEQUENT ACTION SHEET  
TYPE OF INSPECTION Q30 SIGNATURE Henry Hunter

ROBIN D. MULLEN,	:	DISCRIMINATION PROCEDURE
Complainant	:	
	:	Docket No. SE 82-57-1
	:	
	:	CD 82-30
JIM WALTER RESOURCES, INC.,	:	
Respondent	:	

### DECISION

Appearances: Larry Moorer, Esq., Birmingham, Alabama,  
for the Complainant.  
Fournier J. Gale, III, Esq., Birmingham,  
Alabama, for the Respondent.

Before: Judge Fauver

On June 11, 1982, Robin D. Mullen, Complainant, filed a discrimination complaint with the Mine Safety and Health Administration (MSHA), United States Department of Labor, against Jim Walter Resources, Inc., Respondent, under section 105(c) of the Federal Mine Safety and Health Act of 1970, 30 U.S.C. § 801, et seq. Complainant alleged that she was the subject of certain discriminatory actions on August 1, 1980, February 11, 1982, and April 23, 1982. Complainant alleged that she had been discriminated against "by pay, job placement, I've been harassed by being accused of not to work in an unfit manner . . . by foremen [sic] coming to my work area with their lights out and sexual harassment [sic]." MSHA investigated her complaint and found there was no violation of section 105(c) of the Act. Thereafter, Complainant filed the Complaint in this proceeding. After the Complaint was filed, Complainant alleged that another discriminatory act occurred on December 7, 1982.

A hearing on her Complaint was held in Birmingham, Alabama, on November 14 and 15, 1983. Both parties were represented by counsel. Complainant called eight witnesses and introduced six exhibits, all of which were received in evidence. Respondent called three witnesses and introduced eight exhibits, all of which were received in evidence.

1. Complainant, at the time of hearing, November 14-15, 1983, had been employed by Respondent at Number Four Mine for about 4-1/2 years. Number Four Mine, at all times relevant, produced coal for sale or use in or affecting interstate commerce.

2. In late 1981 and early 1982, on at least three occasions, Complainant observed or experienced conditions in the mine which she considered to be unsafe and reported those conditions to her supervisor. In each instance Complainant was relieved from exposure to the condition which she considered unsafe. I do not find discrimination in the way Respondent handled any of these safety complaints.

3. On February 11, 1982, Complainant reported to work at about 3:00 p.m. in a condition indicating by speech, appearance, and mannerisms, that she was under the influence of alcohol or some other drug. Her supervisors advised her, for her own safety and the safety of others, that she did not appear fit for duty and would not be allowed to work that day unless she submitted to an examination at the Brookwood Medical Clinic (a nearby facility where Respondent regularly had medical services performed) and the doctors there found her to be fit for duty. She was also told that if she was found fit for duty she would be paid for her entire shift that day. Complainant refused to go to the Brookwood Clinic for examination, but much later that day went to her private physician for a blood test for alcohol which was conducted about 6:30 to 7:00 p.m. That test showed Complainant's blood alcohol level to be .03 percent. Because of Complainant's apparent unfit condition and her refusal to submit to an examination at Brookwood Clinic, Respondent suspended Complainant for two days without pay.

4. At the direction of the Judge, a pathologist's opinion was obtained after the hearing, with opportunity for both parties to comment on the opinion. The pathologist, Thomas J. Alford, M.D., answered a hypothetical question based on the testimony in this case, finding it probable that Complainant's blood alcohol concentration at 3:00 p.m., on February 11, 1982, was 0.11 (110 mgm. percent) and that she would therefore be legally considered under the influence of alcohol at that time.



to require her to submit to a blood alcohol test at Brookwood Clinic at Respondent's expense and, because of her failure to do so, to suspend her two days for reporting for work in an unfit condition and failing to submit to such a test. By delaying a blood alcohol test until 6:30 or 7:00 p.m., Respondent caused a lower showing of blood alcohol content than would have been shown had she been tested around 3:00 p.m. I find nothing discriminatory in Respondent's treatment of Complainant on February 11, 1982.

6. Complainant filed a grievance under Article XXIII, Section (b)(2) of the National Bituminous Coal Wage Agreement of 1981, concerning Respondent's discipline of her for the February 11, 1982, incident. The grievance went to arbitration. After an arbitration hearing the arbitrator found the facts against Complainant.

7. In April 1982, Complainant bid on a vacancy for a motorman position. The job was awarded under the procedures of the collective bargaining agreement to a miner who was senior to Complainant and who had better experience and qualifications for the motorman job than Complainant. Complainant filed a grievance over this matter, but withdrew her grievance at the third step in the grievance procedure. I find no discriminatory intent or action in Respondent's decision in filling the motorman vacancy.

8. On December 7, 1982, Complainant was disqualified from the position of motorman. I find that she was disqualified from that position because the company in good faith determined that she could not perform all of the required duties of the motorman job, and that this decision by the company was nondiscriminatory and supported by ample facts. Complainant filed a grievance over this disqualification, and the grievance went to arbitration. After an arbitration hearing, the arbitrator found the facts against Complainant.

#### DISCUSSION WITH FURTHER FINDINGS

Complainant alleges in her Complaint that she was discriminated against on August 16, 1980. However, there was no evidence of this alleged act of discrimination. This charge will be dismissed for lack of proof. Also, this allegation is time-barred by section 105(c)(2) of the Act, which will be discussed later.

I also find that Complainant's allegations as to this incident and the August 16, 1980, incident, are barred by the 60-day requirement of section 105(c)(2).

Section 105(c)(2) of the Act states:

Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination.

In the June 11, 1982 complaint filed with MSHA Complainant alleged that she was discriminated against on August 16, 1980, February 11, 1982 and April 23, 1982.

The claims for alleged acts of discrimination occurring on August 16, 1980, and February 11, 1982, are barred by section 105(c)(2) unless Complainant can show that the filing was delayed under justifiable circumstances. Joseph W. Herman v. IMCO Services, 4 FMSHRC 2135 (1982), and David Hollis v. Consolidation Coal Company, 6 FMSHRC 21 (1984). Complainant admitted being aware of her MSHA rights in February or March of 1982, but failed to file her complaint for at least three months after having this actual knowledge. I find that Complainant has not shown justifiable circumstances for untimely filing, and on that independent ground her allegations of discrimination on August 16, 1980, and February 11, 1982, should be dismissed.

Thus, I find against Complainant as to the merits and independently under the limitations period as to her allegations of discrimination on August 16, 1980, and February 11, 1982.

As stated in the Findings, I find no showing of discrimination as to Respondent's award of the motorman vacancy on April 23, 1982. I have noted also that Complainant withdrew her grievance at the third step as to this matter.

Although the arbitration decisions are not binding this proceeding, I find that the arbitration decisions denying Complainant's claims as to the February 11, 1982 incident and the December 7, 1982, incident are thorough well-reasoned, and are entitled to substantial weight in this proceeding.

Complainant has shown no connection between her safe complaints or other protected activity and Respondent's actions on February 11, 1982, April 23, 1982, and December 1982. The evidence overwhelmingly shows that she was disciplined on February 11, 1982, because she violated the collective bargaining agreement by reporting to work in unfit condition and that the actions by Respondent on April 1982, and December 7, 1982, were taken pursuant to the provisions of the collective bargaining agreement and were in no part motivated by protected activity by Complainant.

#### CONCLUSIONS OF LAW

1. The Judge has jurisdiction over this proceeding.
2. Complainant has failed to meet her burden of proving a violation of section 105(c) of the Act with respect to the matter raised in her complaint or at the hearing.
3. On an independent ground, Complainant's allegations of discrimination on August 16, 1980, and February 11, 1982, are barred by the 60-day limitation of section 105(c)(2) of the Act.

All proposed findings and conclusions inconsistent with the above are rejected.

#### ORDER

WHEREFORE IT IS ORDERED that this proceeding is DISMISSED.

  
William Fauver  
Administrative Law Judge

Birmingham, AL 35203 (Certified Mail)

Stan Morrow, Esq., P.O. Box C79, 2121 Building, 2121 Eighth Avenue, North, Birmingham, AL 35203 (Certified Mail)

George Palmer, Esq., U.S. Department of Labor, Office of the Solicitor, 1929 South Ninth Ave., Birmingham, AL 35205 (Certified Mail)

Larry Moorer, Esq., Newton & Tucker, Suite 1722, 2121 Bldg., 2121 8th Avenue, North, Birmingham, AL 35203 (Certified Mail)

SEP 7 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEED
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 84-5
Petitioner	:	A.C. No. 34-01357-035
v.	:	
TURNER BROTHERS, INC.,	:	Docket No. CENT 84-16
Respondent	:	A.C. No. 34-01357-035
	:	Welch Mine No. 1
	:	
	:	Docket No. CENT 84-27
	:	A.C. No. 34-01317-035
	:	
	:	Docket No. CENT 84-44
	:	A.C. No. 34-01317-035
	:	
	:	Heavener No. 1 Mine

### DECISIONS

Appearances: Richard L. Collier, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Petitioner;  
Robert J. Petrick, Esq., Muskogee, Oklahoma, for the Respondent.

Before: Judge Koutras

### Statement of the Proceedings

These proceedings concern civil penalty proposals filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalty assessments for alleged violations of certain mandatory safety and health standards found in Parts 71 and 77, Title 30, Code of Federal Regulations.

Respondent filed answers contesting the proposed penalties, and hearings were held in Muskogee, Oklahoma, on July 10, 1984. The parties waived the filing of post-hearing proposed findings and conclusions. However, all

2. Section 110(1) of the 1977 Act, 30 U.S.C. § 820(1).

3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

### ISSUES

The principal issues presented in these proceedings are whether respondent has violated the provisions of the Act implementing regulations as alleged in the proposal for assessment of civil penalties, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of where appropriate in the course of these decisions.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the gravity of the violation, and (5) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

### Violations

The parties stipulated that the respondent's surface mining and coal processing operations affect interstate commerce, and that the respondent's operations are subject to the Act. The parties also stipulated that the respondent is a small-to-medium sized mine operator and that the assessment of reasonable civil penalty assessments will not adversely affect its ability to continue business.

### Discussion

During the course of the hearings in these cases, the parties advised me that they proposed to settle the following issues:

Ex 84-5

<u>Violation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>	<u>Settlement</u>
5417	8/23/84	77.1605(b)	\$46	\$30

CENT 84-27

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Section</u>	<u>Assessment</u>	<u>Settle</u>
2077340	11/22/83	77.1710(d)	\$147	\$14

The parties presented arguments on the record in support of their proposed settlements. Citation No. 2076417, was issued after the inspector found that a scraper being used to spread topsoil for reclamation purposes had brakes which were not adequate enough to hold the machine on a five percent grade. Petitioner's counsel stated that after further consultation with the inspector who was present in the hearing room, petitioner cannot support the "S&S" finding, and that the inspector has modified the citation to delete this finding. In support of this action, counsel asserted that the cited scraper was operating in an area where no miners were on foot exposed to any hazard, and that the brake condition was corrected within an hour after it was discovered.

Citation No. 2076418, was issued when the inspector found that a waiver which the respondent had obtained concerning providing of bathing facilities, clothing change rooms, and flush toilets at its surface worksite, had expired. Petitioner's counsel stated that upon further consultation with the inspector it has now been confirmed that upon application by the respondent pursuant to the applicable procedures found in section 71.101, the waiver concerning the application of cited section 71.101 has been further extended until September 27, 1984, and that the citation has been terminated. Counsel confirmed that MSHA in fact issued the waiver. Counsel also pointed out that the surface mining facility in question is located approximately 10 miles out of town and is isolated from ready sources of

Respondent's counsel confirmed that the respondent has provided "Porta-John" toilet facilities for the miners at the site in question, and that the miners working at the facility are in agreement with, and do not oppose, the waiver which has been granted for the facility. Counsel also stated that upon the expiration of the current waiver, the respondent will apply for another extension.

presented by the parties in support of the proposed settlement of Citation Nos. 2076417 and 2076418, I concluded and found that the proposed settlements were reasonable and in the public interest. Accordingly, pursuant to Commission Rule 29 CFR 2700.30, the settlements were approved from the bench. My decision in this regard is hereby re-affirmed.

Citation No. 2077340, was issued after the inspector observed that two mechanics who were performing maintenance repair work on an end loader parked at the base of a highwall were not wearing hard hats or caps. Petitioner's counsel asserted that the parties proposed to settle this violation by the respondent agreeing to pay a reduced civil penalty in the amount of \$74. Counsel stated that it was his understanding that the two mechanics had removed their hard hats in order to crawl under the loader to perform some repairs. Counsel also asserted that while MSHA's district manager is in agreement with the proposed settlement reduction, the inspector who issued the citation would not agree to modify and delete his "S&S" finding, and that he disagreed with the factual basis for the proposed settlement. Under the circumstances, the inspector was called as the Court's witness to testify as to circumstances which prompted him to issue the contested citation.

MSHA Inspector Lester Coleman confirmed that he issued the citation in question after observing that the two mechanics, who he identified by name, were not wearing hard hats or caps while performing maintenance on an end loader which had been parked at the base of the highwall in the active pit area. Mr. Coleman stated that the two mechanics had been dispatched to the area to perform some repair work needed to correct a condition which had been previously cited on the loader, and that their work was the work required to abate that particular violation.

Inspector Coleman testified that he observed no hard hats or caps in the area or on the loader, and that the two mechanics had in fact admitted to him that they had no hard hats or caps with them. Inspector Coleman confirmed that in order to abate the citation, one hard hat had to be obtained from the mine office, and that the respondent had to either go to town to purchase a second hard hat, or obtained one from one of its other mining operations in the area.

Inspector Coleman stated that while he observed no



Although respondent's counsel cross-examined Inspector Coleman, the respondent presented no testimony or evidence in defense of the citation or of the inspector's findings. Further, the respondent did not rebut Inspector Coleman's testimony regarding the absence of hard hats, and its defense is that the mechanics "were in a hurry" to complete their abatement work or another violation.

After full consideration of the testimony and arguments concerning this violation, the proposed civil penalty reduction and settlement was rejected from the bench. Respondent then proposed to pay the full amount of the initial civil penalty of \$147, and that was approved. I hereby re-affirm these bench findings, and the citation IS AFFIRMED as issued, including the inspector's "S&S" finding.

#### CENT 84-44

This case concerns a section 104(d)(1) unwarrantable failure order issued by MSHA Inspector Lester Coleman, on January 24, 1984, with special "S&S" findings, charging the respondent with a violation of mandatory safety standard section 30 CFR 77.1605(b). The order, No. 2077410, describes the "condition or practice" cited by Inspector Coleman as follows:

The 992 C caterpillar end loader operating in the 001 pit was not provided an adequate parking brake in that the one provided was inoperative and would not hold the machine against movement (rolling) on a small percentage grade (approx. 5%). There was (2) workmen on foot cleaning coal down grade in front of where the loader was working.

#### Procedural Rulings.

I take note of the fact that respondent's answer to the petition for assessment of civil penalty asserts that the Act does not require the mandatory assessment of civil penalties. In support of this contention, respondent asserted that while the citation concerned a "technical" violation of the Act, the law does not require that every violation, technical or otherwise, be assessed a civil penalty.

Respondent's contention IS REJECTED.. It seems clear to me, that upon a finding of a violation of any mandatory safety

appeals clear to me that any such challenge must be made within thirty (30) days of the service of any order on an operator, and that since the petitioner here did not preserve his appeal rights by filing an independent notice of contest on this issue it is precluded from raising it in this proceeding (Tr. 33-36).

Respondent's counsel stated that his intent was to challenge the special "S&S" findings made by the inspector in this case, as well as the "special assessment" levied by MSHA's Office of Assessments for the alleged violation of section 77.1605(b) (Tr. 38). The parties were informed that the matter of "S&S" may be pursued in this case, but that the "unwarrantable failure" finding and the validity of the order per se is not an issue, and counsel for the parties agreed with my ruling in this regard (Tr. 36, 40). The parties were also informed that I am not bound by any "special assessment" made by MSHA, and that the Secretary's part 100 regulations concerning initial civil penalty assessments are not binding on the presiding judge (Tr. 40-41).

#### MSHA's Testimony and Evidence.

MSHA Inspector Lester Coleman testified as to his background and experience, including ten years service as an MSHA inspector and prior work in the mining industry as a mine foreman. Mr. Coleman described the mine in question as a surface coal mining stripping operation employing approximately 40 to 50 miners working 12-hour shifts, four days a week.

Mr. Coleman confirmed that he issued the order in question on January 24, 1984, during the course of his inspection of the mine. He stated that he observed the loader in question digging coal, and that two men on foot were working "downgrade from the machine" cleaning coal pits with shovels. He also observed another end loader which was "working in conjunction" with the cited machine, and that the second loader would be at different locations in the course of doing its work (Tr. 47). The respondent stipulated that the cited loader in question weighed approximately 188,000 pounds (Tr. 49).

Mr. Coleman stated that while he personally did not test the parking brake in question, the machine operator informed him that it did not work. When Mr. Coleman asked the operator to demonstrate the brake, the operator set the brakes and raised the machine bucket, and the machine rolled (Tr. 47). When asked why he believed the failure to have an adequate parking brake on the machine posed a hazard, Mr. Coleman replied as follows:

the other machine and not contact it but cause the guy to run around it and run over one of the other guys or something.

On cross-examination, Mr. Coleman confirmed that the regular brakes used to control and stop the end loader in question when it was operating in forward and in reverse were operable, and that as long as the operator was in the machine he saw no problem and did not believe that there was any hazard or likelihood of an accident. His only concern was over the fact that if the machine were left unattended, that an adequate parking brake would present a hazard.

Mr. Coleman stated that while he never observed the particular cited machine left unattended he has observed other end loaders left unattended when the operator parks it in the pit area and goes for a drink of water or to the bathroom (Tr. 55). Mr. Coleman conceded that when an operator leaves his machine in certain circumstances, he will stop it, set the brakes, and then lower the bucket to the ground. The bucket is dropped in order to comply with mandatory safety standard section 77.1607(p) which requires that all machine movable parts be secured or lowered to the ground when the machine is not in use (Tr. 55). If the machine were parked with the bucket facing downhill, the machine would stop. However, he believed that the area where the loader was stripping coal had a rock bottom, and that the stripped grade was from one to three percent and it was possible for the machine to slide across the hard surface (Tr. 56).

Mr. Coleman stated that when he first arrived at the area the loader in question was located somewhere else. The foreman sent someone to bring the loader to the pit area, informing him of the parking brake condition, and when it was brought to the pit, the brake was checked (Tr. 57). Mr. Coleman conceded that the area where the machine was operating was less than a 5% grade, and that while it was "flat," he conceded "it wasn't very much of a grade" (Tr. 58). He also conceded that the machine operators were "usually pretty good" about lowering the bucket to the ground when their machines are parked (Tr. 58). He stated that he has never observed a situation where a machine operator has alighted from his machine without lowering his bucket or ripper down (Tr. 62).

Mr. Coleman indicated that during any working day there are three or four times when a machine operator normally has occasion to use his parking brake. One is in the morning

however, since the mine has different grades, and since a foreman may stop a machine operator on a grade to speak with him, he was concerned about the inadequate brake (Tr. 61).

Mr. Coleman confirmed that he has inspected the mine on four or five previous occasions, and that he has never issued any citations for violations of section 77.1607(p) (Tr. 63). He also confirmed that he never observed the two coal cleaner around or near the machine while it was being parked, and he conceded that his belief that a fatality would occur stemmed from his assumption that the machine operator might decide to get off the machine while it is parked on a grade with the bucket up (Tr. 64).

Mr. Coleman stated that the foreman told him that he knew about the parking brake condition on January 23, and that to his knowledge the foreman had not ordered the parts to make the repairs. Mr. Coleman confirmed that the brake was repaired the next day (Tr. 66).

Mr. Coleman stated that the area where the loader was cleaning coal was approximately 150 feet square, and that it was operating in a seam approximately 16 to 18 inches thick. The two men in question were working away from the seam, and he conceded that if the machine happened to roll with its bucket up in the air, it should catch on the 18 inch seam before reaching the area where the men were working. However since there was a ramp along the edge of the coal seam, he believed that the machine could go up the ramp. Even so, he conceded that it would roll back and away from the two men (T

In response to questions from the bench, Mr. Coleman indicated that the loader in question was parked in another area of the mine. However, the foreman wanted to use it to break up the coal in the pit and he sent a workman to bring the machine to the pit (Tr. 70). Once it was driven to the pit area, Mr. Coleman decided to inspect it because an employ had informed him that the parking brake did not work and that is why the machine was parked. Upon checking the machine and finding the parking brake inadequate, Mr. Coleman cited it and had it taken out of service immediately (Tr. 71). He further explained as follows (Tr. 71-72):

Q. So it actually was not doing any loading at the time you observed it?

A. No, he was going to use it to break out

wouldn't be put in service, is that the idea?

A. Yes.

Q. So you didn't just happen to walk in this pit area and see this loader out there breaking coal and the two guys over there shoveling and then have it tested and then take it out of service?

A. No, I didn't.

Q. So you acted based on what somebody else told you, and when the loader was brought over there you tested it and found the parking brakes were inoperative and you wanted it taken out of service?

A. Yes.

Q. So it actually never began breaking and doing all the things that Mr. Petrick suggested it was doing while you were there; is that right?

A. That's correct.

Mr. Coleman stated that when the loader parking brake was tested the bucket was in a raised position, and that it was never tested with the bucket lowered. Had he tested with the bucket down, and found that the machine would roll, he would still have issued the violation because the law that I cited him under requires that he has a parking brake" (Tr. 73). When asked whether he would also have an "S&S" finding had the machine not rolled with the bucket down, he replied "yes," and he explained as follows (Tr. 73-74):

A. Because of the importance of the thing. And the machine is there parked on several different grades. And, granted, usually it's more level than you know, it's two, three, five percent or something like that. And the law requires that they have it and that the -- to me the significant reason, a lot of times they get out and they will park the machine with it still running. A machine that big vibrates and it would start to roll.

happen that would cause the loader to get away and if it did it could likely strike somebody and if it did that it would likely kill them; is that it in a nutshell?

A. Or another machine, haulage trucks. They have haulage trucks that haul in the area, too.

Q. So you were trying to cover all bets, more or less?

A. Yes.

Q. Is that your understanding on how you go about making an S and S, significant and substantial finding?

A. Well, if it was significant or substantially contribute to or cause an accident or something, that's kind of the way I looked at it.

### Findings and Conclusions

#### et of Violation

Respondent is charged with a violation of section 77.1605(b) having an inadequate parking brake on a rubber-tired loader. Respondent presented no witnesses in defense of the citation, and simply relied on the cross-examination of Inspector Coleman to establish that the violation was not significant and substantial.

Mandatory safety standard section 77.1605(b), requires that mobile equipment be equipped with adequate brakes, and that all front-end loaders also be equipped with parking brakes. Although the standard does not specifically require that such parking brakes be adequate, I read this into the language of the standard as a logical requirement. Here, once the parking brakes were tested, it was found to be inadequate because it did not prevent the end loader from rolling. The respondent has not rebutted MSHA's prima facie case of a violation of section 77.1605(b), and the violation IS AFFIRMED.

area, he observed the end loader in question digging coal and operating in the proximity of two men who were working "downgrade" cleaning coal. Given the inspector's asserted concern that if left unattended, with the engine running, the machine could have rolled and struck the two men, my first inclination was to find that the violation was significant and substantial. However, for the reasons which follow, I cannot conclude that this is the case.

On cross-examination, and in response to further bench questions, the inspector admitted that when he first arrived at the pit area, the end loader was in fact parked in another area, and was not in operation or breaking or loading coal. He indicated that someone had informed him that the machine had an inadequate parking brake, and when it was brought to the pit, the inspector had the brake tested, and after finding that it would not hold the machine, he ordered the machine taken out of service until the parking brake could be repaired the next day. In short, the machine was never used, and the petitioner has not established otherwise.

The testimony and evidence in this case establishes that the pit area where the end loader in question would normally be operating was flat, and with very little grade. Further, the inspector conceded that during prior inspection of the mine site he never observed the machine left unattended and in fact he conceded that in his experience, when an operator has to leave the machine to go to the bathroom or take lunch, the machine is always stopped, the front bucket is lowered to the ground, and the operational brakes are set. He also conceded that he has never cited the respondent for a violation of mandatory standard 77.1607(p), which requires that machine buckets be lowered to the ground when not in use, and petitioner advanced no evidence to show that the respondent has ever been cited for such infractions.

The inspector confirmed that the regular brakes used to stop the end loader when it operated forward and in reverse were adequate and operational, and no hazard was presented while the machine was in operation. Although the inspector stated on the face of the violation notice which he issued that the inadequate parking brake would not hold the machine against movement on a grade of "approximately 5%," he conceded during his testimony that it was less than 5%.

downgrade" were in fact out of the pit area. The inspector so conceded that in the event the machine had rolled, it would have come to rest at the edge of the pit, and absent any credible showing that a 188,000 machine can jump up and out of the pit, I cannot conclude that this was reasonably likely to happen. Although the inspector indicated that there is a ramp constructed in the pit to facilitate the machine moving in and out, his "theory" that the machine could have rolled up the ramp, out of the pit, and then rolled down and struck the two men is rejected. There is absolutely no credible facts to establish that this was reasonably likely to occur.

The inspector conceded that when he tested the parking brake, he did so with the bucket up, and not down as it is normally left when the operator leaves the machine. Further, there is no evidence that the inspector ever observed the machine parked in the pit, and he confirmed that he never observed anyone around the machine while parked. Since the parties failed to call the two men in question to testify, I have no basis for determining where they were positioned in relation to the machine, or where they would normally be positioned once the loader was in operation. These are critical facts to any determination as to the likelihood of an accident.

Based on all of the evidence and testimony here presented seems clear to me that the inspector made his "S&S" finding an assumption that when and if the machine were placed in service, the operator would park the machine with the bucket up, in violation of section 77.1607(p), and that he would not follow the normal operational procedures for securing the machine when it is left unattended. Given the fact that the inspector conceded that to his knowledge, end-loader operators always follow those procedures, and given the fact that the inspector offered no credible evidence to the contrary, his assumptions are simply unsupportable. I am convinced that the inspector made his "S&S" finding in order to cover every conceivable set or circumstances which may have triggered an accident once the machine was placed in service. Such a theory of "S&S" would require an inspector to find any violation to be "S&S."

In my view, the only fact presented by the petitioner conceivably support an "S&S" finding in this case is his testimony that the pit foreman admitted that he knew the



also advised him that this reason why the machine had been parked in an area away from the pit where it would normally be operating.

The respondent failed to call the pit foreman to rebut the inspector's testimony, and also failed to rebut the inspector's testimony during cross-examination. By the same token, the petitioner failed to subpoena the pit foreman, and since the inspector marked the "negligence" portion of his citation to indicate a "reckless disregard" of the requirements of the cited standard, I can only speculate that he did so on the basis of the pit foreman's purported admission. Even so, based on all of the circumstances discussed above, including the fact that the inspector immediately took the loader out of service before it was operated in the pit, the totality of the circumstances presented do not establish that an accident was reasonably likely to occur. Even if the machine were placed in service with an inadequate parking brake, I am of the view that the possibility of an accident was remote and not reasonably likely to occur. Accordingly, the inspector's "S&S" finding IS VACATED.

#### Size of Business and Effect of Civil Penalty on the Respondent's Ability to Continue in Business

The parties stipulated that the respondent is a small-to-medium sized mine operator and that the assessment of a reasonable penalty will not adversely affect its ability to continue in business. I adopt these stipulations as my findings and conclusions on these issues.

#### History of Prior Violations

Exhibit G-1 is a copy of a computer print-out summarizing the number of violations assessed and paid by the respondent for the period November 1, 1981, to October 31, 1983, for the Heavner No. 1 Mine. That information reflects a total of eleven paid violations, three of which are for prior violations of section 77.1605(b). However, since the petitioner did not submit copies of these prior section 104(a) citations, I have no way of knowing whether or not they were issued for end loaders. However, I do note that two of the citations were issued in November 1982, and are "single penalty" assessments for \$20 each, and the other one was issued in June 1983, and was assessed at \$50.

...corrected and the violation abated the next day (11: 00).  
Accordingly, I find that the violation was promptly abated in  
good faith by the respondent.

negligence

The inspector's un rebutted testimony in this case  
strongly suggests that the foreman or pit superintendent,  
with prior knowledge of the inadequate parking brake, but  
nonetheless had the machine brought to the pit area in that  
condition, fully intending to use it. The inspector's testimony  
is as follows:

A. No, sir, the machine was in another area  
when I arrived, and the foreman, Superintendent  
Jim Payne sent another workman to get the loader.  
And he didn't inform this guy about the condition,  
so the guy went to another area and brought the  
loader into this pit area. And when he was bringing  
it down we checked it (Tr. 57).

And, at Tr. 76-77:

Q. Okay. Was Mr. Payne there when the machine  
was brought to the area?

A. Yes.

Q. He's the fellow that asked them to bring it?

A. Yes.

Q. Now, why would Mr. Payne do something like  
that if he knew that the parking brake was  
inoperative? Does that make sense, particularly  
with a federal inspector there. I don't know  
Mr. Payne, I assume he has got better sense than  
that, but maybe not, I don't know. Mr. Payne, if  
you're here, I apologize for that, sir, but I  
couldn't resist.

A. I can't answer that.

Q. I can't see the pit foreman -- is Mr. Payne  
a foreman of some kind?

and you're telling me that Mr. Payne knew this piece of equipment had defective parking brakes and he tells the fellow to bring it over there and put it in operation.

A. Mr. Payne told me that he knew himself.

On the basis of the foregoing, I conclude and find that the violation here resulted from the respondent's failure to exercise the slightest degree of care to insure that the inadequate brake condition was attended to before bringing the cited machine to the pit area, fully intending to put it into operation. Although I have considered the possibility that the respondent had the machine parked because it intended to repair the inadequate parking brake, absent any mitigating testimony by the respondent, I can only conclude that had the inspector not removed the machine from service, Mr. Payne would have allowed it to be put in service with the inadequate brake condition. Under the circumstances, I conclude and find that the violation resulted from gross negligence on the part of the respondent, and this is reflected in the civil penalty assessed by me for the violation.

### Gravity

Although I have concluded that the violation here is not significant and substantial, I cannot conclude that it was nonserious. While it is true that there was no reasonable likelihood that an accident would occur, it seems to me that given the fact that Mr. Payne apparently knew about the condition and was willing to take a chance and put the machine with an inadequate parking brake, there was a possibility, albeit unlikely, that an accident could occur. Accordingly, I conclude and find that the violation was serious.


### Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that a civil penalty in the amount of \$300 is appropriate for the cited violation.

### ORDER

The respondent IS ORDERED to pay a civil penalty in the amount of \$300 for a violation of mandatory standard

is proceeding is dismissed.

  
George A. Koutras  
Administrative Law Judge

tribution:

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SEP 12 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 82-1
Petitioner	:	A.C. No. 29-00096-03011
	:	
v.	:	Docket No. CENT 82-2
	:	A.C. No. 29-00096-03012
PITTSBURG & MIDWAY COAL	:	
MINING COMPANY,	:	McKinley Strip Mine
Respondent	:	

### DECISION

Appearances: Jordana W. Wilson, Esq., Office of the Solicitor  
U.S. Department of Labor, Dallas, Texas,  
for Petitioner;  
John A. Bachmann, Esq., The Gulf Companies,  
Denver, Colorado,  
for Respondent.

Before: Judge Morris

These cases, heard under the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the "Act"), arose as a result of an inspection of respondent's coal mine. The Secretary of Labor seeks to impose civil penalties because respondent allegedly violated safety regulations promulgated under the Act.

Respondent denies any liability under the Act.

After notice to the parties, a hearing on the merits was held in Gallup, New Mexico on October 19, 1983.

The parties waived the right to file post trial briefs.

### Issues

The issues are whether respondent violated the regulations, if so, what penalties are appropriate.

eral Regulations, Section 77.1302 J, which provides as follows:

§ 77.1302 Vehicles used to transport explosives.

(j) When vehicles containing explosives or detonators are parked, the brakes shall be set, the motive power shut off, and the vehicles shall be blocked securely against rolling.

MSHA's evidence shows that on July 7, 1981 Federal Inspector Lawrence Rivera issued this citation when he observed a parked truck; it lacked chocks to prevent it from rolling. The truck, which carried explosives, was located in the pit area (Transcript pages 12, 13; Exhibit P3). The truck would have to be moved the next day (Tr. 14-15).

Two miners were affected by this hazard which could cause a fatality. The possibility of an accident was remote as the truck was parked in a small dip in a coal seam (Tr. 13, 14, 52-53). Chocks were brought in and placed to secure the vehicle (Tr. 15).

### Discussion

The facts establish a violation of the regulation. Respondent's witness Gary D. Cope agreed that the vehicle did not have chocks (Tr. 136, 137).

The evidence shows the truck was parked in a dip. Accordingly, it was not likely to move in any event. The foregoing evidence relates to issues of gravity and negligence. These are factors to be considered in assessing a civil penalty.

### Citation 826734

This citation alleges respondent violated 30 C.F.R. 77.1110, a performance standard. It provides:

§ 77.1110 Examination and maintenance of firefighting equipment.

Firefighting equipment shall be continuously maintained in a usable and operative condition. Fire extinguishers shall be examined at least once every 6 months and the date of such examination shall be recorded on a permanent tag attached to the extinguisher.

The condition was abated by installing usable equipment (Tr. 19).

Respondent's witness Cope produced photographs of the Chemical type fire extinguishers installed on the company pickup trucks (Tr. 104, 105; Exhibit D4). Respondent's photographs also show the performance of the extinguisher. It is suitable for the use intended (Tr. 110-116; D4 thru D7).

The manufacturer's specifications do not provide a description of this particular extinguisher. The hand operated unit discharges the flow of its contents through a short one inch nozzle at the discharge point.

### Discussion

The cited regulation requires that firefighting equipment shall be maintained in a usable and operative condition. Fire extinguishers are equipped with a hose together with an operating nozzle. However, even though these extinguishers were not fully equipped, they are, nevertheless, in a usable and operative condition. Hence, respondent did not violate the regulation.

For these reasons this citation should be vacated.

### Citation 826737

This citation alleges a violation of 30 C.F.R. § 77.101(c) cited in the previous citation.

The inspector issued this citation because the hose and nozzle were missing on the extinguisher. The equipment on the truck number 121. The cited vehicle was different from the one previously cited. Respondent abated the citation by installing usable equipment (Tr. 20, 21; P5).

Respondent's evidence indicates that the same type of equipment existed as discussed in connection with the previous citation (Tr. 104-105, 109, 113-114).

discussed in connection with Citation 826734.

### Citation 826741

This citation alleges a violation of 30 C.F.R. 77.1109(c)(1) which provides:

(c)(1) Mobile equipment, including trucks, front-end loaders, bulldozers, portable welding units, and auger shall be equipped with at least one portable fire extinguisher.

Inspector Rivera issued this citation when he observed a forklift without a fire extinguisher (Tr. 22, 23; P6). The forklift was observed when it was approaching the shop. At the point it was about 600 feet away from the shop (Tr. 23-24; P10).

One or two miners were affected by the hazard arising from the lack of a fire extinguisher (Tr. 25-26). An extinguisher was installed to abate this condition (Tr. 26-27).

Respondent's evidence indicates its forklift remains in the area of a single structure which consists of the shop, warehouse and office building (Tr. 139). The forklift normally will go 50 feet to the open air storage. Then it will travel about 50 feet to the fuel dock. In addition, it will encompass 100 feet to the other end of the oil dock (Tr. 139). These areas all have firefighting equipment (Tr. 139, 140).

### Discussion

Respondent considers the forklifts are used in connection with warehouse and open air storage. Therefore, they constitute "auxiliary equipment" (Tr. 103, 104). Section 77.1109(c)(3) refers to auxiliary equipment in the following terms:

(3) Auxiliary equipment such as portable drills, sweepers, and scrapers, when operated more than 600 feet from equipment required to have portable fire extinguishers, shall be equipped with at least one fire extinguisher.

A single credibility issue arises in connection with this citation. Inspector Rivera indicated that he observed the forklift when it was about 600 feet from the shop (Tr. 23-24).



I credit respondent's evidence. Witness Cope would be more familiar with the area where the forklift operates. In addition it is apparent from his testimony that Inspector Rivera was unsure of the location of the forklift in relation to the shop area when he observed it (Tr. 23, 24).

The principal issue then evolves into whether a forklift is "mobile" or "auxiliary" equipment. If the latter no fire extinguisher is required.

I conclude that a forklift constitutes mobile equipment. This conclusion rests on several facts. First of all, a forklift is "capable of moving" and it thus meets the definition of being "mobile", Webster's New Collegiate Dictionary, 732, (1979). In addition, Section 77.1109(c)(1) describes certain types of mobile equipment whereas Section 77.1109(c)(3) describes certain types of auxiliary equipment. I find that a forklift is more akin to the equipment the standard describes as "mobile" than to the equipment described as "auxiliary".

The citation should be affirmed.

Citation 826744

This citation alleges a violation of 30 C.F.R. § 77.604 which provides:

§ 77.604 Protection of trailing cables.

Trailing cables shall be adequately protected to prevent damage by mobile equipment.

Inspector Rivera wrote this citation when he recognized eight tire marks (crossing and returning), on a 23,900 volt cable (Tr. 28; P7). The cable, in an obvious location alongside the roadway, supplied power to a dragline (Tr. 28, 29).

A rupture of the cable could shock a person. In addition an explosion could occur. Severe burns, electrical shock and possibly a fatality could result from this condition (Tr. 28-31). The condition was abated when the miners were instructed to avoid the cable (Tr. 31).

Respondent's witness agreed there were eight tire marks on the cable (Tr. 122). The top soil had not been removed; the surface was soft (Tr. 122).

The company did not know who had run over these cables. In the past, the company has disciplined two or three employees for driving over its cables (Tr. 134-135).

### Discussion

This regulation requires that trailing cables shall be adequately protected to prevent damage. In the instant case it is unrefuted that the cable was lying on the ground and it had been run over by mobile equipment (Tr. 75). Adequate protection would include barricading the area, burying the cables or suspending the cables overhead (Tr. 87).

In his closing argument respondent's counsel relies on C.F.&I. Steel Corporation, 3 FMSHRC 2168, (1981). In the cited case Judge John A. Carlson vacated a citation involving an alleged violation of the same standard. Judge Carlson ruled in his case that he was more persuaded by respondent's inferences than those urged by the government, 3 FMSHRC at 2169.

The case relied on by respondent is not controlling. On the contrary, in this case, I am persuaded by Inspector Rivera's testimony. An explosion could be caused by the sharp material under the surface of the cable. It had obviously been run over by a vehicle (Tr. 28-29). In addition, Inspector Rivera has a considerable background as an MSHA coal mine inspector. This experience causes me to accept his opinion of the hazard involved (Tr. 7, 8; P2).

The citation should be affirmed.

### Citation 826745

This citation alleges a violation of 30 C.F.R. § 77.204 which provides:

§ 77.204 Openings in surface installations; safeguards  
Openings in surface installations through which men or material may fall shall be protected by railings, barriers, or covers or other protective devices.

Inspector Rivera issued Citation 826745 because the operator failed to provide a railing at the opening of a loading dock.

One worker was affected by this hazard (Tr. 37).

The condition was abated when a broken hook was replaced welding it at one side (Tr. 38). The operator of the forklift requested some type of protection here for this condition (Tr. 67).

In Inspector Rivera's opinion the opening here is in a vertical surface. It is similar to a door opening (Tr. 69-70).

### Discussion

In support of its motion to dismiss respondent relies on State ex. rel. City Iron Works v. Ind. Com., 368 N.E. 2d 291, (1977).

In the cited case a worker fell from the edge of a roof. The Appellate Court decision construes three sections of the Code of Specific Safety. The requirements of the Ohio Code are considerably narrower than the scope of 30 C.F.R. Section 77. Accordingly, City Iron Works is not controlling.

In this case the Secretary's regulation, 30 C.F.R. § 77.604 defines the scope of surface installations. It requires an operator to maintain all mine structures, enclosures or other facilities in good repair to prevent accidents and injuries. The general description of a surface installation in Section 77.604 is sufficiently broad to include respondent's loading dock. On the facts here it is established that miners could fall from the dock if a protective chain was not used to provide a warning to prevent a fall. In addition, a chain had been furnished across this opening before this citation was issued. Inspector Rivera observed that a hook on one side had broken off. The condition was abated by rewelding the hook (Tr. 35, 38).

The citation should be affirmed.

CENT 82-2  
Citation 826746

This citation alleges a violation of 30 C.F.R. § 77.604, relating to protecting trailing cables, cited, supra.

Inspector Rivera wrote this citation when he saw tire marks from where a pickup had run over a cable. The pickup, adjacent to the loading dock, was traveling across the dock. This was

The cable, carrying 23,900 volts, involves an electrical shock hazard (Tr. 41). Men in the pickup as well as men moving the cable would be affected by such a hazard (Tr. 41).

The condition was obvious because it was adjacent to the road. The hazard was abated by installing a berm between the road and the cable (Tr. 43). According to the inspector, the mine superintendent knew the condition existed (Tr. 44-45).

### Discussion

The uncontroverted facts establish a violation of the regulation. The citation should be affirmed.

### CIVIL PENALTIES

The six criteria for assessing a civil penalty are set forth in 30 U.S.C. § 820(i).

In considering the statutory criteria I find that the operator has a minimal adverse history. Five violations were assessed between August 8, 1979 and January 10, 1980 (Exhibit A). The penalties, as proposed, are appropriate in relation to the large size of the operator (Tr. 9). In those citations where I find a violation I also find that the operator was negligent because the violative conditions were open and obvious. As previously discussed the gravity and negligence concerning Citation 826733 are overstated and the penalty should be reduced. The gravity of the remaining citations is apparent on the face of the citations. In favor of the operator is its good faith in rapidly abating defective conditions.

On balance, I deem the following penalties to be appropriate:

### CENT 82-1

<u>Citation</u>	<u>Proposed Assessment</u>	<u>Disposition</u>
826733	\$170	\$ 85
826734	66	Vacate
826737	72	Vacate
826741	84	84
826744	180	180
826747	180	180

Citation  
826746

Assessment  
\$78

Disposition  
\$78

Based on the foregoing findings of fact and conclusion of law I enter the following:

ORDER

In CENT 82-1

1. The following citations are affirmed and a civil penalty is assessed as indicated:

<u>Citation</u>	<u>Penalty</u>
826733	\$ 85.00
826741	84.00
826744	180.00
826745	122.00

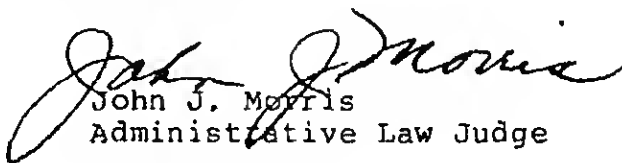
In CENT 82-2

826746	\$ 78.00
--------	----------

2. The following citations and all penalties therefor are vacated.

In CENT 82-1

Citation 826734  
Citation 826737

  
John J. Morris  
Administrative Law Judge

Distribution:

Jordana W. Wilson, Esq., Office of the Solicitor, U.S. Department of Labor, 555 Griffin Square, Suite 501, Dallas, Texas 75201 (Certified Mail)

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SEP 12 1984

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 84-151
Petitioner	:	A. C. No. 15-13881-03520
	:	
v.	:	Pyro No. 9 Slope
	:	William Station
	:	
PYRO MINING COMPANY,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Steffey

Counsel for the Secretary of Labor filed on August 30, 1984, a motion for approval of settlement in the above-entitled proceeding. Under the parties' settlement agreement, respondent would pay a reduced penalty of \$450 for a single alleged violation of 30 C.F.R. § 75.200 in lieu of the penalty of \$800 proposed by MSHA.

The alleged violation here at issue is one which could not be disposed of in my decision issued July 26, 1984, in this proceeding because it was not a part of the record resulting from the hearing held in Docket Nos. KENT 84-87-R and KENT 84-88-R which was the basis for the decision issued on July 26, 1984. Although the Commission issued a "Direction for Review" of that decision on August 24, 1984, the issues to be considered by the Commission do not pertain to the remaining issues in this proceeding which have been settled by the parties.

Section 110(i) of the Federal Mine Safety and Health Act of 1977 lists six criteria which are required to be used in determining civil penalties. The motion for approval of settlement discusses those criteria. The mine here involved produces about 1,600,000 tons of coal annually and respondent's production on a company-wide basis is approximately 3 million tons per year. Those figures support a finding that respondent is a large operator and that penalties in an upper range of magnitude should be assessed to the extent that they are determined under the criteria of the Act.

January 1984. MSHA's proposed penalty of \$800 is based on history of previous violations given in the proposed assessment sheet. When 25 violations occurring during 125 inspections are evaluated under the provisions of MSHA's assessment formula in 30 C.F.R. § 100.3(c), the violations per inspection day are so few that no part of the penalty proposed by MSHA could have been assigned under the criterion of history of previous violations. Since I am dealing with a motion to approve settlement of MSHA's proposed penalty, it is appropriate for me to consider the information given in the proposed assessment sheet, rather than the somewhat inconsistent figure of 40 previous violations given in the motion for approval of settlement.

Additionally, it should be noted that a single number of previous violations is hardly suitable for evaluating a respondent's history of previous violations because it cannot be applied under section 100.3(c) of the assessment formula unless the number is also associated with the number of inspections which occurred during the time that the violations were accumulated. In most cases which go to hearing, the Secretary's report provides a computer printout which lists previous violations along with the dates on which they were cited. That kind of information enables a judge to determine whether the violations occurred many months prior to the violation under consideration or immediately prior to the violation under consideration. Violations of the same standard occurring immediately prior to a violation under consideration show that respondent's history is not favorable, whereas violations which have occurred a year or more prior to the violation under consideration show a trend toward an improvement in safety. Unless a judge has the kind of information described above, it is difficult to evaluate the criterion of history of previous violations. As indicated, however, I am relying upon the information given in the proposed assessment sheet in this proceeding and that shows that no part of MSHA's proposed penalty was assigned under the criterion of history of previous violations.

The motion for approval of settlement states that respondent abated the violation within the time provided and MSHA's narrative findings indicate that the violation was abated "in a reasonable period of time", but neither the motion for approval of settlement nor MSHA's narrative findings indicate whether any portion of the penalty was assigned under the criterion of the operator's good-faith effort to achieve rapid compliance. My practice has always been to increase a penalty if there is information available to show that respondent

find that it was appropriate for no portion of the penalty to be assigned under the criterion of good-faith abatement.

The motion for approval of settlement states that payment of the penalty will not have an adverse effect on the ability of respondent to continue in business. Therefore, MSHA appropriately did not reduce the penalty under the criterion that payment of large penalties would cause respondent to discontinue its business.

Consideration of the remaining two criteria of negligence and gravity requires a brief discussion of the nature of the alleged violation. The inspector alleged that a violation of section 75.200 had occurred because respondent had failed to install 6 timbers at each crosscut along the supply entry to within 240 feet of the tailpiece of the conveyor belt, as required by the roof-control plan. Out of 11 crosscuts, four had the timbers set, four of them had timbers set on one side, and three did not have timbers set at all. The motion for approval of settlement agrees that the inspector properly considered the violation to have been associated with a high degree of negligence so that no reduction in the penalty should be made under the criterion of negligence.

Since the parties have not based a reduction of MSHA's proposed penalty on any of the five criteria discussed above, it is obvious that all of the reduction has to be made under the criterion of gravity. The motion for approval of settlement bases the reduced penalty primarily on the fact that the inspector had evaluated the criterion of gravity by checking item 21C on his citation to show that nine persons could have been expected to be exposed to injury if a roof fall had occurred. The motion states that all of the crosscuts at issue were a long distance from the face area and that it would be highly unlikely that a roof fall in the supply entry would affect all nine persons working on the section which was served by the supply entry.

The fact that less than nine persons would be affected by a roof fall, if one had occurred, is a reason to reduce the penalty, but some additional discussion may be helpful in showing why the parties' settlement agreement should be granted. It should be noted that MSHA's proposed penalty of \$800 is based on narrative findings which state that the inspector's evaluation of the alleged violation has been considered. The narrative findings do not indicate, however, how much of the penalty



occurred in the supply entry.

On the other hand, the narrative findings do state that six timbers were required to be set at crosscuts to within 100 feet of the face, whereas the inspector's citation stated they had to be set within 240 feet of the tailpiece of the conveyor belt. Therefore, the person who prepared the narrative findings may have considered the violation to be more serious than it really was because he or she may have been evaluating the lack of timbers as a matter which was a rather constant factor during actual production operations, rather than a danger which would only have affected a person traveling in the supply entry at a considerable distance from the working section.

Any time that penalties are determined on the basis of subjective judgments, as occurred in this instance, it is difficult to say that a penalty should be precisely \$800 as proposed by MSHA or \$450 as agreed upon by the parties for purpose of settlement. I believe that the discussion above shows that a penalty of \$450 is reasonable in this instance and I find that the parties' settlement agreement should be approved.

WHEREFORE, it is ordered:

(A) The motion for approval of settlement is granted and the parties' settlement agreement is approved.

(B) Pursuant to the parties' settlement agreement, the Mining Company, within 30 days from the date of this decision shall pay a civil penalty of \$450 for the violation of section 75.200 alleged in Citation No. 2074793 dated January 14,

*Richard C. Steffey*  
Richard C. Steffey  
Administrative Law Judge

Distribution:

Darryl A. Stewart, Esq., Office of the Solicitor, U. S. Department of Labor, Room 280, U. S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

William M. Craft, Assistant Director of Safety, Pyro Mining

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 82-58-M
Petitioner	:	A.C. No. 45-02582-05002
	:	
v.	:	Pole Road Pit No. 1 Mine
	:	
FERNDALDE READY MIX & GRAVEL,	:	
INC.,	:	
Respondent	:	

### DECISION

Appearances: Ernest Scott, Jr., Esq., Office of the Solicitor  
U.S. Department of Labor, Seattle, Washington,  
for Petitioner;  
Mr. William A. VanWerven, President, Ferndale Ready  
Mix & Gravel, Inc., Ferndale, Washington,  
appearing Pro Se.

Before: Judge Morris

This case, heard under the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the "Act"), arose from an inspection of respondent's surface sand and gravel operation. The Secretary of Labor seeks to impose civil penalties because respondent allegedly violated various safety regulations promulgated under the Act.

After notice to the parties, a hearing on the merits was held in Bellingham, Washington on January 9, 1984.

The parties did not file post trial briefs.

### Issues

The threshold issue is whether a Congressional funding resolution prevents MSHA from proceeding with this case.

The secondary issues are whether respondent violated the various regulations; if so, what penalties are appropriate.

### Stipulation

2. Respondent was the owner and operator of Pole Road No. 1 Mine, at all times material to this case.

3. Respondent's business affects commerce, and the M. Safety and Health Review Commission has jurisdiction to hear this case.

4. Respondent admits paragraph III, of the petition filed in WEST 82-58-M.

5. As a result of an inspection of the Pole Road Pit Mine, Everson, Washington, by Federal Mine Safety and Health Inspector James Broome on July 28, 1981, Citations Nos. 588682, 588683, 588715, 588716, 588717, 588718, 588719, and 588720, were issued to Respondent.

6. Copies of the aforesaid citations are contained in Exhibit "A" to the Petition for Assessment of Penalty filed in this case by petitioner, and may be admitted into evidence for the sole purpose of showing they were issued.

7. Orders of Withdrawal Nos. 587071, 587058, 587059, 587060, 587141, 587142, 587143, 587144, and 587145, copies of which are contained in Exhibit "A" to the petition for assessment of penalty filed in this case, were issued to respondent on September 2, 1981, by Federal Mine Safety and Health Inspector David Estrada.

8. Copies of the aforesaid Orders of Withdrawal may be admitted into evidence for the sole purpose of showing they were issued.

9. As of the date (September 2, 1981) Inspector David Estrada issued the aforesaid Orders of Withdrawal, respondent had not yet corrected the conditions identified in the citations referred to in numbered paragraph No. 5 above.

10. Respondent corrected the conditions referred to in numbered paragraph No. 5, herein above and came into compliance with the Federal Mine Safety and Health Act of 1977, and applicable regulations on or about September 10, 1981.

11. During the two year period ending July 28, 1981, respondent did not have any history of violations under the

14. The Pole Road Pit NO. 2 Mine produced 9-10 thousand of wash materials during 1981.

15. Respondent's annual dollar volume of business done on sales made during 1980, 1981, and 1982 are set forth below:

1980 - \$60,000  
1981 - \$40,000  
1982 - \$50,000

16. Respondent had approximately the following number of production employees during the following years:

1980 - One part time  
1981 - One part time  
1982 - One part time

17. At the commencement of the hearing it was further stipulated that Mr. VanWerven and his son do not contest the factual allegations contained in the nine citations issued by James Broome (Transcript at pages 5 and 6).

#### MSHA's fiscal authority

A threshold issue concerns MSHA's authority to expend funds in this case. The evidence on this issue is uncontroverted.

MSHA inspected this sand and gravel operation and issued citations on July 28, 1981. Orders of withdrawal were issued September 2, 1981. On December 18, 1981 respondent filed its notice of contest.

On December 15, 1981 President Reagan signed H.R.J. Res. 370, Pub. L. No. 91-92, § 131, 95 Stat. 1183, 1199 (1981). The foregoing Congressional funding resolution prohibits MSHA from enforcing the Mine Safety Act provisions with respect to various operations including sand or gravel activities (Exhibit J-1).

On January 4, 1982 MSHA wrote to respondent and indicated that the foregoing funding resolution restricted the agency from enforcing the Act. MSHA's letter further indicated that

The above prohibition which arose from the funding resolution did not continue in effect. Jurisdiction over sand and gravel was returned to MSHA when President Reagan signed the fiscal supplemental appropriations bill on July 18, 1982 (Exhibit J-

On this record it does not appear that MSHA expended any funds on this case during the time the funding prohibition was in effect. Once jurisdiction was returned to MSHA, in July 1982 the agency could legally proceed with the prosecution of this action. The case was not presented until January 1984, long after the funding prohibition had been dissolved.

On a related case deciding jurisdiction in relation to the same Congressional funding resolution see the Commission decision of Secretary on behalf of Cooley v. Ottawa Silica Company, 6 FMSHRC 516, 525 (1984).

MSHA is not in violation of the funding resolution, accordingly, the agency complied with the law in presenting its evidence in this case.

Citation 588681

This citation proposes a civil penalty of \$34. Respondent does not contest the factual allegations in the citation. The allegations are, in part, as follows:

The elevated walkway around the wash screen was not kept clear of rocks and dirt on the drive side of the screen. The buildup presented a tripping hazard to person walking on the walkway.

(Exhibit E-1).

The citation allegedly violated is contained in Title 30 Code of Federal Regulations, Section 56.11-2, which provides as follows:

56.11-2 Mandatory. Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided.

MSHA Inspector James B. Broome indicated that he inspected

single could be sustained would range from a minimal injury to fatality (Tr. 11, 12; Exhibit E10). The inspector concluded management was not aware of this condition (Tr. 10-11).

Respondent presented no evidence concerning this citation.

### Discussion

The Commission previously affirmed a violation of this regulation in a factual setting where there were tools, hooks, wire rope and rocks lying near the edge of the elevated walkway. In addition, there was no toeboards around the edge of the platform to prevent the loose material from falling over the edge and striking employees below. El Paso Rock Quarries, Inc., 3 FMSHRC 35, 39. The writer is bound by the above Commission precedent.

For these reasons Citation 588681 should be affirmed.

### Citation 588682

This citation proposes a penalty of \$72 and it reads, in part:

The V-belt drive for the lead pulley of the wash screen feed conveyor was not guarded. It was about 5 1/2 feet above the level of its wash screen walkway and readily accessible to a person on the walkway.  
(Exhibit E-2).

The citation allegedly violated, 30 C.F.R. 56.14-1, provides:

### Guards

56.14-1 Mandatory. Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons and which may cause injury to persons, shall be guarded.

plain sight. It should have been known to respondent. In addition, the inspector had previously advised the company it was not in compliance concerning the V-belt. No citation had been previously issued for this condition because the plant was not then operating (Tr. 12-14).

The same wash screen appears in this citation as in the previous citation (Tr. 13-14). The V-belt drive is 5 1/2 feet from the walkway; the pulley itself is directly in the center of the walkway (Tr. 15; Exhibit E-11).

This condition could cause injuries ranging from bruised fingers to the loss of a hand (Tr. 14-15).

Respondent's witness Larry William VanWerven testified that inspectors on previous occasions had not required guards under conditions cited here (Tr. 35-38).

#### Discussion

The facts establish a violation of Section 56.14-1. The facts of the case see the Commission decision of Missouri Company, 3 FMSHRC 2470 (1981).

Respondent's defense is generally asserted as to all citations regarding citations. It is in the nature of a collateral attack against MSHA because the inspectors did not previously issue citations for these same violative conditions.

The fact that citations were not previously issued for violations of the guarding standard does not invoke the doctrine of collateral estoppel. The inspectors have different areas of expertise and it may well be that for some particular reason a violative condition is (or is not) brought to an inspector's attention. The doctrine cannot be invoked here to deny the protection of the Mine Safety Act. I have previously refused to apply the doctrine in similar circumstances. Servtex Materials Company, 5 FMSHRC 1359 (1983); Kennecott Minerals Company, WEST 82-155-M (August 1984); see also the Commission decision in King Knob Coal Company, Inc., 3 FMSHRC 1417 (1981).

Respondent generally raised this issue and this ruling applies to Citation 588716, 588717, 588718, infra.

The citation should be affirmed.

The plant operator did not have a method of communication to summon help in case of an emergency.  
(Exhibit E-3).

The citation alleges respondent violated 30 C.F.R. 56.18- which provides:

56.18-13 Mandatory. A suitable communication system shall be provided at the mine to obtain assistance in the event of an emergency.

In addition to the factual allegations in the citation, Inspector Broome testified there was no means to summon help if a worker was injured. But no employee was exposed to this hazard since this was a one man operation (Tr. 16-17).

Larry VanWerven testified that there was a private business located about 750 feet from the walkway. The business was open six days a week from 9 a.m. to 5 p.m. (Tr. 34, 35).

### Discussion

The facts establish a violation of the regulation. The unavailability of a business telephone 750 feet from the walkway is not a "suitable" communication system. It is both too remote and not under the control of another.

### Citation 588715

This citation proposes a penalty of \$195 and it reads, in part:

The 966 Cat front end loader, which was feeding the plant and loading customer trucks did not have the automatic backup warning alarm in working order. The large muffler prevented the operator from having a clear view to the rear.

(Exhibit E-4)

The citation alleges respondent violated 30 C.F.R. 56.9-2. The correct standard would be 30 C.F.R. 56.9-87. Inasmuch as respondent does not dispute the factual allegations in the citation, pursuant to the Federal Rules of Civil Procedure, the



30 C.F.R. 56.9-87 provides as follows:

56.9-87 Mandatory. Heavy duty mobile equipment shall be provided with audible warning devices. When the operator of such equipment has an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level or an observer to signal when it is safe to back up.

Witness Broome observed that at the time of his inspection only one worker was present. Hence, there was no exposure to employees. But customers who were loading at the time were exposed to this hazard (Tr. 16-18).

Mr. VanWerven told the inspector that he didn't know the truck lacked a backup alarm (Tr. 18).

Respondent offered no evidence in connection with this violation.

The facts establish a violation. The citation should be affirmed since the lack of knowledge of this defect does not constitute a defense.

Citation 588716

This citation proposes a penalty of \$60 and it reads, in part:

- The tail pulley of the pea gravel conveyor did not have a guard to prevent someone from getting caught in the moving machinery.

(Exhibit E-5)

The standard allegedly violated regarding guards, 30 C.F.R. 56.14-1, is set forth, supra.

The MSHA inspector testified that he had informally advised Mr. VanWerven 2 to 6 months before the inspection that the conveyor, which was in plain sight, needed a guard (Tr. 19).

The operator of the conveyor was the only worker exposed (Tr. 19).

Citation 588717

This citation proposes a penalty of \$60 and it reads, in part:

The tail pulley of the 7/8" rock conveyor did not have a guard over the pinch points to prevent a person from getting caught in the moving machinery.

(Exhibit E-6)

The standard allegedly violated, 30 C.F.R. 56.14-1, is set forth, supra.

Inspector Broome indicated he had notified Mr. VanWerven about this condition. One worker was exposed to the violative condition which could cause injuries ranging from fractured hand to a fatality (Tr. 19-21).

This tail pulley, about knee high, was near a footing at the bottom end of the screen (Tr. 21).

Respondent's evidence generally indicated that other inspectors failed to require guards (Tr. 35-36).

Discussion

The testimony and the photographs (Exhibit E-13) establish violation of the standard. Respondent's defense has been previously discussed and found to be wanting.

The citation should be affirmed.

Citation 588718

This citation proposes a penalty of \$60 and it reads, in part:

The tail pulley of the 1 1/2" rock conveyor did not have a guard to prevent someone from getting caught in the pinch points of the moving machinery.

(Exhibit E-7)

The standard allegedly violated, relating to guards, 30 C.F.R. § 56.14-1, is set forth, supra.

number of times it would be necessary to shovel out the debris from the tail pulley.

The same type of an accident could occur as with other unguarded tail pulleys. An accident could range from a bruised hand to the loss of an arm to a fatality (Tr. 23).

The tail pulley was in plain sight. In addition, the inspector had informally advised the company about this condition (Tr. 22-23).

### Discussion

The facts establish a violation of the standard. The same ruling applies to the defense of collateral estoppel.

### Citation 588719

This citation proposes a penalty of \$44 and it reads, in part:

The walkway around the wash screen had an opening on the sand screw end through which a man could fall or step into the worm of the sand screw.

(Exhibit E-8)

The standard allegedly violated, 30 C.F.R. 56.11-12, provides:

56.11-12 Mandatory. Openings above, below, or near travelways through which men or materials may fall shall be protected by railings, barriers, or covers. Where it is impractical to install such protective devices, adequate warning signals shall be installed.

The inspector saw one employee exposed to this condition. Each time the employee walked around the walkway he had to step over the hole in the screen. The hole, about two feet by two feet was in plain sight (Tr. 24). A person could fall 2 1/2 feet if he fell through the hole (Tr. 25).

### Discussion

The facts and the photograph (E-14) clearly establish a violation of the regulation. Respondent's defense has been previously discussed. It is again denied.

The standard allegedly violated, 30 C.F.R. 56.11-2, was cited in connection with the first citation in this decision.

The inspector testified that a 42 inch handrail encompassed the walkway; except there was no handrail for 8 to 10 feet at the walkway. In addition, a chain was not hooked to block off access at the end of the walkway (Tr. 26, 27).

One worker was exposed to this condition. If he fell backwards off of the eight foot high walkway his injuries could range from minimal to fatal (Tr. 26-27).

The inspector had previously notified the operator of this condition (Tr. 25).

### Discussion

The facts establish a violation of the regulation. The handrail on the elevated walkway was not of a "substantial construction" since a portion of the guard rail was missing.

Respondent's defense has been previously discussed and denied.

The citation should be affirmed.

### CIVIL PENALTIES

Section 110(i) of the Act, now 30 U.S.C. 820(i), sets forth the criteria to be considered in assessing civil penalties.

Respondent has no adverse prior history relating to the issuance of any citations. The business, as noted in the stipulation, is quite small. The respondent was highly negligent in that these conditions were open and obvious. In addition, before these citations were issued, respondent had been informally advised by Inspector Broome of the conditions existing in Citations 588716, 588717, 588718 and 588720. The parties stipulated that the imposition of the proposed penalties will